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In The

Supreme Court of the United States

October Term, 1995

MICHIGAN SUPERVISORS' OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, WILLIAM T. GANNON, on behalf of himself and all other similary situated supervisory security personnel employed by Defendant; TRAVIS U. JONES, on behalf of himself and all other similarly situated civilian employees of Defendant,

Petitioners,

vs.

MICHIGAN DEPARTMENT OF CORRECTION; MICHIGAN DEPARTMENT OF CIVIL SERVICE,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Pursuant to 29 C.F.R. § 541.118(a) are the Petitioners, who by Respondents' own admission are salaried employees, entitled to reimbursement for the four days they were furloughed, without pay, in July and August of 1991?

2. Was it an abuse of discretion for the Court of Appeals to give retroactive effect to 29 C.F.R. § 541.5d, thereby circumventing and negating the provisions of C.F.R. § 541.118(a), which was in effect and applicable to public employers at the time?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iii
Opinions Below	1
Statement of Jurisdiction	2
Regulations Involved	3
Statement of the Case	6
A. Procedural History	6
B. Course of Proceedings	6
C. Statement of Facts	8
Reasons for Granting the Writ	11
I. Pursuant to 29 C.F.R. § 541.118, Petitioners, who are salaried employees, are entitled to reimbursement for the four days they were furloughed without pay in July and August of 1991.	11
II. The Court of Appeals abused its discretion in issuing a decision which had the effect of impermissibly retroactively implementing a Department of Labor Regulation	14

Contents

	Page
Conclusion	17

TABLE OF CITATIONS

Cases Cited:

Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990)	16
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985)	8, 15
Guardians Association of the New York City Police Department v. Civil Service Commission of the City of New York, 463 U.S. 582, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983)	15
Knecht v. City of Redwood City, 683 F. Supp. 1307 (N.D. Cal. 1987)	16
Michigan Ass'n. of Governmental Employees v. Michigan Department of Corrections, 992 F.2d 82 (6th Cir. 1993)	17
National League of Cities v. Usery, 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976)	14, 15

Statutes Cited:

28 U.S.C. § 1254(1)	2
29 U.S.C. § 201	2, 6, 8

Contents

	Page
29 U.S.C. § 2617	2
United States Constitution Cited:	
Tenth Amendment	14
Rules Cited:	
Federal Rule of Appellate Procedure 4(a)(1)	7
Federal Rule of Appellate Procedure 4(a)(3)	2, 7
Federal Rule of Appellate Procedure 4(a)(4)	2
Federal Rule of Civil Procedure 12(b)	6, 7
Other Authorities Cited:	
Fair Labor Standards Act of 1938	2, 6, 8
29 C.F.R. § 541, *et seq.*	10
29 C.F.R. § 541.5d	i, 4, 14, 17
29 C.F.R. § 541.118	11
29 C.F.R. § 541.118(a)	i, 3, 9, 11
29 C.F.R. § 541.118(a)(6)	16
29 C.F.R. § 541.118(A)(6)	3, 9, 12, 13

Contents

	Page
29 C.F.R. § 541.118(A)(6)(ii)	5

APPENDIX

Appendix A — Sixth Circuit Court of Appeals Opinion Filed July 13, 1995	1a
Appendix B — United States District Court Judgment Filed January 21, 1994	45a
Appendix C — United States District Court Opinion, Order and Partial Judgment Filed March 4, 1993	47a
Appendix D — United States District Court Opinion, Order and Partial Judgment Filed March 4, 1993	57a
Appendix E — United States District Court Opinion and Order Filed July 23, 1993	65a
Appendix F — United States District Court Opinion and Order Filed July 23, 1993	69a
Appendix G — United States District Court Opinion and Order Filed July 23, 1993	76a
Appendix H — United States District Court Order Filed August 24, 1993	82a
Appendix I — United States District Court Opinion and Order Filed December 20, 1993	84a

OPINIONS BELOW

This action originally came before the District Court as a five count complaint alleging that the Respondents had violated the Fair Labor Standards Act and had also breached an implied contract of employment with the Petitioners by failing to pay Petitioners premium pay for overtime hours worked in excess of 80 hours in a bi-weekly pay period and then due to budget constraints, furloughing Petitioners, whom Respondents classified as "salaried personnel" for four days, without pay.

First the District Court dismissed Count IV of the complaint for failing to state a claim on which relief could be granted. Count IV alleged that the Respondents had violated Petitioners' rights by failing to comply with the terms of various grievance awards regarding overtime payment for mandatory pre-shift line-ups.

Next the District Court granted the Respondents summary judgment in Counts I and II, holding that Petitioners were exempt from the overtime provisions of the FLSA. It also granted Petitioners summary judgment in Count V, holding that the Respondents had violated the FLSA by subjecting the Respondents who were salaried personnel to a reduction in wages while furloughed, even though Petitioners had performed some work in those weeks.

Finally the District Court addressed Count V of the complaint, which was a state law breach of contract claim, based on pendant jurisdiction and the court dismissed this count, holding that since all other claims had been disposed of, the Court no longer had jurisdiction over a state law matter.

The Sixth Circuit Court of Appeals then reversed and remanded the District Court's rulings.

STATEMENT OF JURISDICTION

The Court's jurisdiction to review the post judgment order of the United States Court of Appeals for the Sixth Circuit overturning the District Court's grant of summary judgment in favor of Petitioners in Count V and upholding the grant of summary judgment in favor of Respondents in Counts I and II is invoked pursuant to 28 U.S.C. §1254(1).

The underlying District Court case involved a dispute regarding the non-payment of premium wages for overtime hours worked in excess of the standard bi-weekly work schedule and the furloughing, without pay for less than a full work week of employees who the Respondents treated for all other purposes as salaried personnel, both actions were allegedly in contradiction of the Fair Labor Standards Act of 1938, 29 U.S.C. § 201, as amended. The District Court had jurisdiction over the case under 29 U.S.C. § 2617. A partial judgment in favor of Respondents in Counts I and II was entered by the District Court on March 4, 1993, and a second partial judgment in favor of Petitioners in Count V was also entered on March 4, 1993. On March 18, 1993 Respondents filed a motion to alter or amend the grant of summary judgement in favor of Petitioners, which was denied by the District Court on July 22, 1993. On January 13, 1994 the parties entered into a stipulation as to the amount of damages due Petitioners under the District Court's grant of summary judgment. On January 21, 1994 the District Court entered a judgment consistent with that stipulation.

Respondents filed an appeal with the Sixth Circuit Court of Appeals within thirty days of the District Court's entry of orders of judgment pursuant to Federal Rule of Appellate Procedure 4(a)(4). Petitioners filed a Notice of Appeal pursuant to Federal Rule of Appellate Procedure 4(a)(3) which requires a party to file a notice of appeal within days after the date the original notice of

appeal was filed. The Court of Appeals upheld the grant of summary judgment in favor of Respondents and reversed the summary judgment granted in favor of Petitioners, finding that the District Court lacked the authority for its ruling.

This Petition for Writ of Certiorari is timely filed on October 11, 1995, ninety days after the Sixth Circuit Court of Appeals opinion and order dated July 13, 1995.

REGULATIONS INVOLVED

29 C.F.R. § 541.118(a) provides in pertinent part:

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

29 C.F.R. § 541.118(A)(6) provides that:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case.

> Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburse the employe for such deductions and promises to comply in the future.

29 C.F.R. § 541.5d (effective September 6, 1991) provides that:

> (a) A federal, state or local government employee ("public employee") who otherwise meets the requirements of § 541.118 shall not be disqualified from exemption under §§ 541.1, 541.2, or 541.3 of this part on the basis that such employee is paid according to a pay system established by statute, ordinance, regulation or public policy under which the employee accrues personal leave and sick leave and, absent the use of such accrued leave (because the leave has been exhausted or by the employee's choice), requires the public employee's pay to be reduced ("leave without pay") for absences, for personal reasons or because of illness or injury, of less the one work-day.

> (b) Deductions from a public employee's pay that are not regular and recurring for absences due to a budget-required furlough shall not disqualify the employee from being paid "on a salary basis" *except* in the workweek in which such deductions occurred.

29 C.F.R. § 541.118(A)(6)(ii) (effective September 6, 1991) provides that:

> If a Federal, State or local government (i.e., public sector) employer's pay system is as described in § 541.d, and either:
>
> (A) the public employer has made no actual deductions from the pay of otherwise-exempt public employees for absences, for personal reasons or because of illness or injury, of less than one work-day before the effective date of § 541.5d (i.e., September 6, 1991); or
>
> (B) The employer reimburses any otherwise-exempt public employees for deductions from salary that were made for absences, for personal reasons or because of illness or injury, of less than one work-day occurring before the effective date of § 541.5d (i.e., September 6, 1991); then eligibility for exemption for public employees who otherwise meet the requirements of § 541.118 and who were subject to such pay system will not be defeated for failure to pay "on a salary basis."

STATEMENT OF THE CASE

A. Procedural History

Respondent State of Michigan is a sovereign state of the United States of America, Respondents Department of Corrections, and Department of Civil Service are legislatively created agencies of the State of Michigan. Petitioner Michigan Supervisors Union, Office & Professional Employees International Union, is a Limited Recognition Organization, representing otherwise non-represented employees within the State of Michigan's Classified Civil Service system; remaining Petitioners are employees of the Michigan Department of Corrections.

The underlying District Court case involved a dispute regarding the non-payment of premium wages for overtime hours worked in excess of the standard bi-weekly work schedule and the furloughing, without pay for less than a full work week of employees who the Respondents treated for all other purposes as salaried personnel, both actions were allegedly in contradiction of the Fair Labor Standards Act of 1938 as amended.

B. Course of Proceedings

In 1991 Governor Engler announced that since the State of Michigan was in a financial crisis he was going to furlough all non-essential state employees, so that the State could maintain its constitutionally-mandated balanced budget. In accordance with Governor. Engler's edict the Department of Corrections, with the Department of Civil Service's permission, furloughed the Petitioners in this matter during the months of July and August. On July 9, 1991 Petitioners filed this action. On July 16, 1991 Petitioners filed an amended complaint. On August 23, 1991 Respondents filed a motion to dismiss pursuant to Federal Rule of

Civil Procedure 12(b). On June 4, 1992 Judge Enselen issued an order and opinion denying in part and granting in part Respondents' motion to dismiss pursuant to Rule 12(b).

On June 11, 1992 Petitioners filed a motion for reconsideration of the Court's June 4, 1992 order, or in the alternative leave to file a third amended complaint, which was denied on November 12, 1992.

On July 23, 1992 Petitioners filed a motion for partial summary judgment, on August 20, 1992 the Respondents filed a motion for partial summary judgment and opposition to Petitioners' motion. On March 4, 1993 the District Court denied Petitioners' motion and granted Respondents' motion for summary judgment as to Counts I and II.

On January 8, 1993 Petitioners filed their second amended complaint.

On January 28, 1993 Respondents filed a motion for partial summary judgment. And on February 1, 1993 Petitioners filed a response to Respondents' motion and a motion of their own for partial summary judgment as to Count V. The District Court denied Respondents' motion and granted Petitioners' motion for partial summary judgment as to Count V on March 4, 1993.

On April 1, 1993 Petitioner William Gannon filed a notice of appeal of the District Court's ruling, pursuant to FRAP 4(a)(1). Then on February 17, 1994 a second Notice of Appeal of the District Court's Decisions was filed by all Petitioners. Defendant Michigan Department of Corrections filed its Notice of Appeal, pursuant to FRAP 4(a)(3) on February 28, 1994.

The Sixth Circuit Court of Appeals reversed and remanded the District Court's orders on July 17, 1995.

C. Statement of Facts

The Fair Labor Standards Act of 1938 was enacted by Congress to ensure that all working Americans received a fair wage, and human working conditions. In *Garcia v. San Antonio Metro Transit Authority*, 469 U.S. 528 (1985) this Court held that the provisions of the Act applied to all workers, both public and private sector, that the Tenth Amendment did not preclude application of the Act to employees of the various States. Petitioners in this matter are employees of the Michigan Department of Corrections, and as such clearly fall within the provisions of the Act.

The Michigan Department of Corrections historically treated many of the Petitioners as "salaried employees" within the context of the FLSA. The Act itself does not define what a salary basis is, however the Department of Labor defines it as:

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

29 C.F.R. § 541.118(a). The Respondents contended that Petitioners did receive a fixed wage each week which was not effected by the number of hours worked, these employees did not receive overtime premium pay for hours worked in excess of 80 hours in a bi-weekly pay period, and Respondents further contended that while Petitioners may have theoretically been subject to having their pay docked for absences of less than a day, in practice it had never happened.

In 1991 the State of Michigan experienced a budget shortfall, its projected expenditures were going to exceed its revenues, resulting in a deficit budget. The Michigan Constitution mandates the State maintain a balanced budget. Accordingly the decision was made to furlough all "non-essential" state employees, without pay, for four days during the months of July and August of 1991.

The decision was implemented and the Petitioners were furloughed and their paychecks docked accordingly, in spite of the fact that the furloughs were only for four days and the standard workweek is five days, so by definition all of the Petitioners must have worked at least one day in the week in which they were furloughed, and most worked three days.

29 C.F.R.§ 541.118(A)(6) provides:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were

> being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent or is made for reasons other than lack of work, the exemption will not be considered to have ben lost if the employer reimburse the employee for such deductions and promises to comply in the future.

This is exactly the relief Petitioners sought and the District Court granted in Count V, reimburse them for the improper deduction and comply with the Act in the future.

The Circuit Court however seized on a Department of Labor letter ruling dated January 15, 1986, in which it stated:

> Where an occasional deduction that is not permitted by section 541.118 is made from the salary of an otherwise exempt employee, the exemption would be lost in that workweek when the deduction is made. However if such deductions are regular and recurring, we would question whether the employee is actually paid "on a salary basis" and the exemption may be denied in all workweeks in which it is claimed, including those weeks where no deduction is claimed.

The Department of Labor obviously recognized that particular letter ruling did not apply to the facts and circumstances of this case, because in August 1992 they amended the regulations to specifically address this situation. The Circuit Court's ruling has the effect of impermissively giving retroactive effect to those amendments of 29 C.F.R. § 541, *et seq*. The Court lacks the authority to retroactively implement an administrative regulation.

In any event the Petitioners argue the effect of that letter ruling should rather be narrowly construed and restricted to the specific facts of the case it addressed to expand it to the facts of this case would effectively give the employer the choice of deliberately violating the provisions of the Act and then choosing their own remedy, to minimize the finanical repercussion on themselves.

REASONS FOR GRANTING THE WRIT

I.

PURSUANT TO 29 C.F.R. § 541.118, PETITIONERS, WHO ARE SALARIED EMPLOYEES, ARE ENTITLED TO REIMBURSEMENT FOR THE FOUR DAYS THEY WERE FURLOUGHED WITHOUT PAY IN JULY AND AUGUST OF 1991.

29 C.F.R. § 541.118(a) provides that:

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

The Respondents in this matter have consistently maintained that Petitioners fit this criteria. They have submitted affidavits supporting this position and contended that they have never made an impermissible deduction from Petitioners' pay. From the inception of this action they have asserted that Petitioners are bona fide "salaried employees" and that the instant deductions should not disqualify this status. If that is indeed the case, the Petitioners are entitled to be reimbursed for the four days they were furloughed without pay. Petitioners were not absent for personal reasons or due to illness, or even due to lack of work, they were absent at the direction of their employer. The employer made the deliberate decision to furlough these personnel because they did not have the money to pay them, and for no other reason. The Respondents have never argued that the furlough was for lack of work or any other reason. The decision was implemented and the Petitioners were furloughed and their paychecks docked accordingly, in spite of the fact that the furloughs were only for four days and the standard workweek is five days, so by definition all of the Petitioners must have worked at least one day in the week in which they were furloughed, and most worked three days.

29 C.F.R. § 541.118(A)(6) provides:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these

> interpretations is inadvertent or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburse the employe for such deductions and promises to comply in the future.

Since the deductions in this case were neither inadvertent nor caused by a lack of work, a clear reading of 29 C.F.R. § 541.118(A)(6). requires that Petitioners either be reimbursed for their absence or that their overtime exemption be lost, not just for this pay period, but from the time of the impermissible deduction, back to the employee's date of hire.

Rather than reimburse Petitioners, or forego the overtime exemption, as the regulations require, Respondents seek to justify their refusal to do so, yet maintain their exemption by relying upon a 1986 letter ruling by the Department of Labor which states:

> Where an occasional deduction that is not permitted by section 541.118 is made from the salary of an otherwise exempt employee, the exemption would be lost in that workweek when the deductions is made. However if such deductions are regular and recurring, we would question whether the employee is actually paid "on a salary basis" and the exemption may be denied in all workweeks in which it is claimed, including those weeks where no deduction is claimed.

However, the facts of that case may be easily distinguished from the present. That ruling was issued in response to an employers' inquiry as to the effect of failure to make overtime

premium payments, not where as in the present case, the issue is employer-compelled unpaid absences. It should be obvious that even the Department of Labor recognized that this letter ruling did not affect, much less govern the present situation or they would not have felt compelled to promulgate 29 C.F.R. § 541.5d. On the contrary the fact that they did promulgate this regulation clearly indicates that the Department of Labor recognized that the Code of Federal Regulations in effect at the time of these furloughs, clearly both envisioned and prohibited these type of unpaid furloughs, by a public employer.

Apparently the Court of Appeals felt that the mere fact that this was the first time such a deduction was made was sufficient to bring this matter within the purview of the DOL's letter ruling, however such a holding is tantamount to allowing an employer to willfully and deliberately violate the provisions of the FLSA and its attendant regulations then chose the remedy most advantageous to themselves for their own wilful violation of those regulations.

II.

THE COURT OF APPEALS ABUSED ITS DISCRETION IN ISSUING A DECISION WHICH HAD THE EFFECT OF IMPERMISSIBLY RETROACTIVELY IMPLEMENTING A DEPARTMENT OF LABOR REGULATION.

One need only examine the history of the FLSA, and its applications to the various States to realize that is exactly what has happened here.

In 1976 in *National League of Cities v. Usery*, 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976) this Court held in a 5-4 decision that the Tenth Amendment to the United States

Constitution rendered the FLSA's application to state and local governments unconstitutional. Then nine years later this Court expressly overturned *Usery* in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985) and held that the FLSA was applicable to state and local governments, in its entirety. Recognizing the potential financial implication the *Garcia* ruling could have on state and local governments, Congress enacted legislation amending the FLSA's applications to them until April 15, 1986.

Five years have passed since the *Garcia* ruling and Congress' intervening legislation were passed. In that time it should have become clear to everyone that the FLSA and its attendant regulations were fully applicable on both state and local governments. Congress could have further amended the FLSA at that time, or at any time in the intervening period to exempt state and local governments from the "salary basis test", but it chose not to. In *Guardians Association of the New York City Police Department v. Civil Service Commission of the City of New York*, 463 U.S. 582, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983), this court held:

> *Although caution must be exercised when dealing with congressional inaction, we have recognized that it is appropriate to attribute significance to such inaction where an administrative interpretation "involves issues of considerable public controversy," United States v. Rutherford, 442 U.S. 544, 554, 61 L. Ed. 2d 68, 99 S. Ct. 2470 (1979), and Congress has not acted to correct any misinterpretation of its objectives despite its continuing concern with the subject matter.*

Likewise the Department of Labor could have at any time

exercised its administrative authority and amended the C.F.R. to grant that same exemption, but again it chose not to, until September 1991, after these furloughs were complete.

It is against this history that the Court of Appeals issued their ruling. Granted the court purportedly based their ruling on the 1986 DOL letter ruling, however, as previously stated, that ruling clearly had no application to the present situation for at least two reasons, first, it dealt with the payment or non-payment of overtime, not compelled unpaid absences. Second, the court misinterpreted both the letter ruling and 29 C.F.R. § 541.118(a)(6), as the court specifically held Respondents' admission is based on their contention that the facts of this case fall within the provision of 29 C.F.R. § 541.118(a)(6), which provides that when an impermissible deduction is made during a situation when there is no work available, the employer loses the bona fide executive exemption for the entire period when such deduction were made. We agree.

However in this case there was work available, there was just no money available to pay for the work, and no one can seriously contend otherwise. And even if 29 C.F.R. § 541.118(a)(6) applied, as the court so aptly pointed out in *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990). "The exception in subsection (6) is for an employer who makes a one-time improper deduction and then corrects its error." And while this may have been a one-time improper deduction, the Respondents have steadfastly refused to correct their error, by reimbursing Petitioners for the furlough days. Further as the court pointed out in *Knecht v. City of Redwood City*, 683 F. Supp. 1307 (N.D. Cal. 1987): "The exception in subsection (6) applies to one-time or inadvertent deductions, not to a settled policy of subjecting the pay of employees to deductions." Again while this was a one time deduction, it was not inadvertent. Rather it was a edict from the highest executive office in the State.

Obviously, at least the DOL recognized that ruling had no value in the present situation or it would not have felt compelled to issue its new regulations, specifically addressing this situation in September 1991. And in fact both the District and Circuit Courts in *Michigan Ass'n of Governmental Employees v. Michigan Department of Corrections*, 992 F.2d 82 (6th Cir. 1993), a case relied upon by the Respondents and cited with approval by the court, seemed to recognize that the courts were not at liberty to give retroactive effect to the September 1991 amendment to the regulations, as was done here.

CONCLUSION

The District Court's action in granting Petitioners' summary action in Count V were proper. A clear reading of the case law, the Act, and its attendant regulations clearly support the District Court's ruling. And accordingly the District Court's ruling cannot be found to be clearly erroneous and the Circuit Court erred in reversing it. *Further the Court of Appeals grossly abused its discretion when it sought to do judically what the Department of Labor could not do administratively, give retroactive effect to 29 C.F.R. § 541.5d.* Therefore the Circuit Court reversal and remand of the District Court's decision was improper and the Petitioners respectfully request it be reversed.

Respectfully submitted,

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APPENDIX A — SIXTH CIRCUIT COURT OF APPEALS OPINION FILED JULY 13, 1995

NOT FOR PUBLICATION

Nos. 94-1203/1264

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHIGAN SUPERVISORS' OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, WILLIAM T. GANNON, on behalf of himself and all other similarly situated supervisory security personnel employed by Defendant; TRAVIS U. JONES, on behalf of himself and all other similarly situated civilian employees of Defendant,

Plaintiffs-Appellants,
Cross-Appellees,

v.

MICHIGAN DEPARTMENT OF CORRECTIONS; MICHIGAN DEPARTMENT OF CIVIL SERVICE,

Defendants-Appellees,
Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

BEFORE: CONTIE, MILBURN, and SILER, Circuit Judges.

MILBURN, Circuit Judge. Plaintiffs, Michigan Supervisors' Office & Professional Employees International

Appendix A

Union, William T. Gannon, and Travis Jones, appeal and defendants, the Michigan Department of Corrections ("MDOC") and the Michigan Department of Civil Service ("MDCS"), cross-appeal the district court's orders and judgments in this class action seeking recovery of unpaid overtime under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219.

In plaintiffs' appeal, the issues are (1) whether the district court erred in granting summary judgment for defendants on plaintiffs' claims for overtime in Count I and II of their second amended complaint, (2) whether the district court erred in ordering that no additional plaintiffs could "opt in" to this action after July 23,1993, (3) whether the district court erred in denying plaintiffs' request for liquidated damages, costs, and attorney's fees, (4) whether the district court erred in dismissing plaintiffs' pendent state law claim for breach of Michigan's compensation plan in Count III of their second amended complaint, (5) whether the district court erred in dismissing plaintiffs' claims concerning their rights under various grievance awards for failure to exhaust administrative remedies, and (6) whether the district court erred in determining that sergeants and lieutenants are not entitled to reimbursement for budget-related furlough days because they are not paid on a salary basis and are entitled to overtime.

In defendants' cross-appeal the issues presented are (1) whether the district court's application of the FLSA to plaintiffs violates the Tenth Amendment to the Constitution, and (2) whether the district court erred when it found that the FLSA required defendants to reimburse salaried employees for deductions in wages made as the result of four budget-related furlough days in August of 1991. For the reasons that follow, we affirm in part and reverse in part.

Appendix A

I.

A.

Plaintiffs are employees of the MDOC. However, they are divided into two classes for purposes of this litigation: the supervisor class consists of the supervisors of the security personnel in MDOC correctional institutions; the civilian class consists of civilian employees of MDOC. Plaintiffs have been divided into two classes because under the FLSA, they would be eligible to receive overtime compensation, if they do not fall within an exception, at different rates: civilians are eligible to receive overtime pay at a rate equal to one-and-one half times their regular hourly rate in excess of forty hours per week, whereas supervisors are eligible to receive overtime pay for hours worked in excess of eighty-six hours in a fourteen day (biweekly) pay period.

MDOC has not paid overtime to the supervisors for hours they worked in excess of 86 hours in a biweekly pay period, nor has it paid overtime compensation to civilians for hours they worked in excess of forty hours per work week. Instead, plaintiffs have received compensatory time off on an hour-for-hour basis, one hour of compensatory time for one hour of overtime, for the extra hours that they have worked. J.A. 191-99.

Plaintiffs are subjected to rigid attendance and timekeeping requirements by MDOC. They are required to keep set working hours, and are required to record the actual hours they work by either punching a time clock, submitting a written time sheet, or both.

Plaintiffs assert that MDOC subjects their pay to reductions

for absences from work of less than a full day's, i.e., eight hours, duration if the absences cannot be "covered" as vacation, sick leave, personal leave, or accrued compensatory time. For this assertion, plaintiffs rely on the provision of the State of Michigan's Compensation Plan, § 11 — Sick Leave Standard, II.d, which states:

> Sick leave shall not be credited or used in anticipation of future leave credits. In the absence of applicable leave credits, compensation reduction for the time lost shall be made for the work period in which the absence occurred. The employee may elect not to use annual leave to cover such absence.

J.A. 274-75. In response, defendants have submitted the affidavit of Jan Miller, the Director of Labor Relations for MDOC. Miller's affidavit states in relevant part that

> [t]he duties of each of the Plaintiffs listed in Class I and Class II of Plaintiffs' lawsuit fall within the definition of a bona fide executive, administrative, or professional capacity and hence these employees have been considered to be exempt from the overtime requirements of its Fair Labor Standards Act pursuant to 29 U.S.C. § 213(a)(1).
>
> . . .
>
> This section [Michigan's Compensation Plan, § 11 — Sick Leave Standard, 11, d] contemplates absences of 8 hours or more. It

is generally applied in situations for employees granted a medical leave of absence prior to application and approval of such a leave of absence.

7. Employees ineligible for overtime, who have absences of less than 8 hours duration, in the absence of available leave credits or compensatory time, *do not incur a reduction in pay.* If such a reduction occurred it would be in error or inadvertent. The Michigan Department of Corrections Policy Directive PD-DWA-01.02 . . . states the following in the timekeeping section:

> "Employees shall not take time off without the use of leave credits unless on an approved leave of absence . . ."

The subsection on late arrivals only provides for lost time (reduction in pay) for employees eligible for cash payment of overtime.

8. It is the clear intent of the MDOC that no pay reduction occur for less than 8 hours. There is no provision in this policy allowing deductions for absences of less than one day for employees ineligible for overtime in the absence of available leave credits or compensatory time.

. . .

Appendix A

> While Plaintiffs are expected to adhere to certain shift arrivals and departures, and are required to punch a time clock or otherwise maintain timesheets, this policy has been implemented by the MDOC in part for accountability to the taxpayers of this state, as a mechanized means of collecting time records, and for security purposes, for protection of the employees in the event of a prison uprising or other emergency situation, and to determine who is actually present at the facility. The policy is not intended as a punitive measure.

J.A. 274-77.

Finally, in a letter dated June 26, 1991, plaintiffs were notified that due to budgetary restrictions, a revenue shortfall, classified state employees would be subject to temporary layoff, a furlough, on four specific days, consecutive or non-consecutive, in August of 1991. The record indicates that the furloughs of plaintiffs in this action occurred during the biweekly pay periods ending on August 17, 1991 and August 31, 1991. J.A. 576.

B.

This appeal involves a class action brought pursuant to section 16 of the FLSA, 29 U.S.C. § 216. There are two classes of plaintiffs in this action: (1) the supervisor class, which consists of class representative William T. Gannon and similarly situated supervisors of security personnel in correctional institutions run by MDOC; and (2) the civilian class, which consists of class

representative Travis U. Jones and similarly situated civilian employees of the MDOC.

Plaintiffs filed their complaint in this action on July 9, 1991, and they filed their first amended complaint on July 16, 1991. Plaintiffs filed their second amended complaint on January 8, 1993.

The second amended complaint contains five counts. Count I alleges that the MDOC violated the FLSA by failing to pay overtime compensation to the members of the supervisor class. Count II alleges that MDOC violated the FLSA by failing to pay overtime compensation to the members of the civilian class. Count III alleges that MDOC breached its contract of employment with all the plaintiffs by failing to comply with the requirements set forth in the Michigan Civil Service Compensation Plan. Count IV alleges that MDOC and MDCS violated the rights of the supervisor class, established by Civil Service procedures and civil service grievance awards, by failing to pay them overtime compensation for the time they spent attending mandatory daily line-up meetings prior to the start of their shifts. Count V alleges that the MDOC violated the FLSA by failing to pay the plaintiffs their full salary for certain workweeks in which they worked a part of the week and were furloughed by MDOC for the remainder of the week due to budgetary constraints.

First, with regard to the claims of the supervisory class plaintiffs for the violation of their rights under the grievance awards in count IV, the district court in an opinion and order issued on June 3, 1992, granted defendants' motion to dismiss Count IV of plaintiffs' first amended complaint under Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 12(b)(6) for failure to

state a claim upon which relief can be granted. The district court found that Count IV failed to state a claim upon which relief can be granted "[b]ecause [it] allege[d] violations of grievance awards prior to plaintiffs exhausting the appropriate administrative remedies, while failing to allege that exhausting those remedies would constitute a useless effort." J.A. 92. Further, in an opinion and order dated November 12, 1992, the district court denied plaintiffs' motion to reconsider the dismissal of Count IV of their amended complaint, and the court also denied plaintiffs' motion for leave to file a third amended complaint in which they proposed to "add to Count IV an allegation that exhaustion of administrative remedies would be useless." J.A. 322.

Second, with regard to plaintiff's claims for overtime compensation in Counts I and II, the district court granted defendants' motion for summary judgment on those claims in an opinion dated March 4, 1993. Specifically, the district court found that "plaintiffs in this case are 'salaried' as defined under 29 C.F.R. § 541.118(a). Thus, they are exempt under the FLSA. Defendants' motion for summary judgment as to counts I & II is granted." J.A. 424.

Third, with regard to the claims in count V, the district court granted plaintiffs' motion for summary judgment in an opinion dated March 4, 1993. Specifically, the court concluded that because it had found that plaintiffs were salaried employees when dismissing their claims for overtime in counts I and II, under 29 C.F.R. § 541.118(a), they were entitled to their full salaries for the workweeks in which they had been furloughed because they had performed some work during those weeks and had been ready, willing, and able to work during the furloughs, which had been imposed for budgetary reasons. However, although the district

court granted summary judgment in favor of plaintiffs, it noted that "the issue of damages as to count V still remains." J.A. 416. Thus, the district court directed the parties to submit stipulations and/or further briefs on the issue of damages.

Finally, in its opinion of March 4, 1993, the district court dismissed the pendent state law claim in count III, the claim for breach of contract, without prejudice. The district court stated that

> because this Court has dismissed counts I, II, IV & V of plaintiffs' second amended complaint, only count III remains. Because count III is purely a state claim, breach of contract, this Court will dismiss this claim without prejudice.

J.A. 416. Thereafter, on March 18, 1993, defendants filed a motion to alter or amend the district court's grant of summary judgment in favor of plaintiffs as to count V of the second amended complaint, which was denied by the district court in an opinion and order dated July 22, 1993.

Subsequently, on May 5, 1993, defendants filed a motion to strike those plaintiffs from the class action who had filed consents to join the action after March 4, 1993. The district court denied defendants' motion on July 22, 1993, stating:

> [T]his Court will deny detendants' motion. However, no more plaintiffs will be allowed to join the class *after* this Court signs its opinions on the issue of damages and the motion to alter or amend. After these two

> issues are resolved, then the [*Roberts v.*] *Western Airlines*[, 425 F. Supp. 416 (N.D. Cal. 1976)] rule will clearly be applicable to this case.

J.A. 486 (emphasis in original). That same day, July 22, 1993, the district court issued an opinion on the issue of plaintiffs' damages under Count V. The district court found (1) that plaintiffs were not entitled to liquidated damages or attorney fees because they had not established that defendants violated either sections 206 or 207 of the FLSA, and (2) that plaintiffs were entitled to prejudgment interest as part of their total damage award.

Thereafter, on July 29, 1993, plaintiffs filed a request to add another member, Ann Marie Carlin, to the action as part of the civilian class. J.A. 489. On August 23, 1993, the district court issued an order stating "that no plaintiffs will be allowed to join the class after July 23, 1993, the date this Court filed its opinions on the issue of damages and the motion to alter or amend." J.A. 70.

On December 20, 1993, the district court issued an order granting defendants' request that the members of the class who were entitled to recover reimbursement of the unpaid salary resulting from the furlough under Count V "be limited to those members of plaintiffs' class who were paid on a salary basis, were not ranked below captain, and were forced to take unpaid furlough days." J.A. 72. In addition, the district court ordered the parties to file a stipulation concerning the total damages to be paid to plaintiffs "on or before January 7, 1992." J.A. 73. In an accompanying opinion, the district court stated:

> Plaintiffs have pounced upon some

language in this Court's Order issued March 3, 1993 to assert that this Court found that all plaintiffs are entitled to the furlough day reimbursement. Plaintiffs' interpretation of that Opinion and Order is incorrect. In that Order, this Court ruled that "judgment is GRANTED in favor of all plaintiffs and against all defendants as to count V of plaintiffs' second amended complaint."

A review of the issue being resolved by that order reveals that the Court was not faced with the question of whether sergeants and lieutenants were "salaried employees" under FLSA. Rather, the issue was whether or not, as a matter of law, salaried employees who worked during part of a week were entitled to their full salary for that week even though the state mandated that some furlough days be taken during that week . . . .

As to the issue of whether sergeants and lieutenants are "salaried employees" under FLSA, defendants' contention that the parties have treated these employees as unsalaried since the March 4th Order is persuasive.

. . .

Count V, which sought relief due to the furlough days, was added in the event the Court found that plaintiffs were paid on a "salary basis" under FLSA, rather than as

hourly employees entitled to FLSA's overtime protections. The second amended complaint that added Count V followed on the heals (sic) of a Michigan Civil Service Commission Employment Relations Board ruling in favor of all non-salaried members of plaintiff classes below the rank of captain, awarding them premium overtime compensation for the pre-shift lineups.

This Court, in its Opinion in March, considered those employees similarly situated to named plaintiffs, Travis Jones and William Gannon, who were treated by the State as exempt from the FLSA overtime provisions due to being paid on a salary basis, and found that because their compensation had never in fact been reduced for a partial day's absence, they were "salaried." As a result, though these employees were ineligible for the overtime payments, they were, as a result, eligible for reimbursement of the reduction in salary caused by furlough days. Plaintiff Jones was a deputy warden of a state prison, and plaintiff Gannon was ranked as a captain at the correctional facility.

This Court did not, as contended by plaintiffs, determine that plaintiffs ranked below captain, who were ruled eligible for overtime, were similarly situated to the named plaintiffs and entitled also to reimbursement of lost pay due to the furlough

> days. There has been no finding that the lower ranked plaintiffs, unlike those similarly situated to plaintiffs Jones and Gannon, were not subject to actually having their pay reduced for a partial day's absence.
>
> Finally, plaintiffs have maintained from the outset that none of their members, including sergeants and lieutenants were "salaried" as defined in FLSA.

J.A. 571-74. Further, in its opinion of December 20, 1993, the district court found that under 28 U.S.C. § 1961, the rate for prejudgment interest was 5.68 percent. J.A. 577.

Thereafter, on January 13, 1994, the parties entered into a stipulation which stated in relevant part that:

> 1. The total pay lost by the Plaintiffs who were paid on a salaried basis, were not ranked below captain, and were forced to take unpaid furlough days . . . is $68,933.92.
>
> 2. The prejudgment interest due to the Plaintiffs described in paragraph 1 above is $9,593.99.
>
> 3. The total damages due to the Plaintiffs described in paragraph 1 above, including prejudgment interest, is $78,527.91.

J.A. 578-79. Finally, on January 21, 1994, the district court entered a judgment consistent with the stipulation of the parties.

J.A.75. A timely appeal by plaintiffs and a timely cross-appeal by defendants followed.

II.

A.

Plaintiffs argue that the district court erred by granting summary judgment in favor of defendants on their claims for overtime compensation in Counts I and II. Specifically, plaintiffs assert that the district court erred in concluding that they were paid on a "salary basis" because they were subject to rigid timekeeping requirements, their pay was subject to deductions for absences of less than a day, and their pay was reduced during a mandatory budget-related furlough.

We review a district court's grant of summary judgment de novo. *City of Mount Clemens v. United States EPA*, 917 F.2d 908, 914 (6th Cir. 1990) (citing *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1472 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988)). Rule 56 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") provides that summary judgment is proper only

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c).

"As we consider the appropriateness of summary judgment in the case at bar, we must examine the record, taken as a whole, to determine whether the nonmoving party has raised a genuine issue of material fact." *Mt. Clemens*, 917 F.2d at 913-14 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). In making this assessment, we "must view all facts and the inferences drawn there from in the light most favorable to the nonmoving party." *United States v. Murphy*, 937 F.2d 1032, 1036 (6th Cir. 1991) (citing *60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987)). Furthermore, "the substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985), the Supreme Court expressly overruled its prior ruling in *National League of Cities v. Usery*, 426 U.S. 833 (1976), and held that extension of FLSA coverage to employees of state and local governments was not unconstitutional. Following the Supreme Court's decision in *Garcia*, Congress passed legislation delaying the application of FLSA's "overtime provisions to states and localities until April 16, 1986." *Harris v. District of Columbia*, 709 F. Supp. 238, 239 (D.D.C. 1989) (citing Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150,99 Stat. 787, 788-89).

"Under the FLSA, all employees must ordinarily be paid one and one-half times their normal hourly wage for all hours exceeding forty hours worked in one week." *Barner v. City of Novato*, 17 F.3d 1256, 1259 (9th Cir. 1994) (citing 29 U.S.C. § 207 (a)(1)). "FLSA provides limited exemptions from its overtime rule, however . . . . the exemption at issue here is that for any worker 'employed in a bona fide executive, administrative or professional capacity.' " *Id.* (quoting 29 U.S.C. § 213(a)(1)).

Appendix A

"Congress did not define 'bona fide executive' in the FLSA, choosing instead to delegate that responsibility to the Secretary of Labor." *Michigan Ass'n of Governmental Employees v. Michigan Dep't of Corrections*, 992 F.2d 82, 83 (6th Cir. 1993) (per curiam) (citing 29 U.S.C. § 213(a)(1)). "The regulations define 'bona fide executive' as an employee with supervisory duties who is paid on a salaried basis." *Id.* (citing 29 C.F.R. § 541.1(f); 29 C.F.R. § 541.117(a)). An employee must have both supervisory duties and be paid on a salaried basis in order to fall within the "bona fide executive" exemption. *See Abshire v. County of Kern*, 908 F.2d 483, 484 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991).

In this case, the parties do not dispute that plaintiffs satisfy the supervisory requirement. Thus, this case concerns only whether plaintiffs are paid on a "salary basis." The regulations give the following definition of a salary basis:

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

29 C.F.R. § 541.118(a).

"Under the exceptions in § 541.118(a), deductions made when an employee is absent for a day or more for personal reasons or for sickness or disability if the employer has a disability plan do not affect the salaried status of an employee." *Knecht v. City of Redwood City*, 683 F. Supp. 1307, 1311 (N.D. Cal. 1987) (citing 29 C.F.R. § 541.118(a)(2) and (3)). "However, deductions for absences shorter than a full day fall under neither exception in subsections (2) and (3)." *Id.* " 'A salaried professional employee may not be docked pay for fractions of a day of work missed.' " *Knecht*, 683 F. Supp. at 1311 (quoting *Donovan v. Carls Drug Co., Inc.*, 703 F.2d 650, 652 (2d Cir. 1983)).

"[B]ecause the FLSA is a remedial act, its exemptions, such as the 'bona fide executive' exemption claimed in this case, are to be narrowly construed." *Martin v. Malcolm Pirnie Inc.*, 949 F.2d 611, 614 (2d Cir. 1991) (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)), *cert. denied*, 113 S. Ct. 298 (1992). "[A]n employer bears the burden of proving that its employees fall within an exempted category of the [FLSA]." *Martin*, 949 F.2d at 614 (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974)). The executive exemption is to be applied only to those employees clearly and unmistakably within the terms and spirit of the exemption. *Arnold*, 361 U.S. at 392. " 'Breadth of coverage' is 'vital to [the FLSA's] mission.' " *Thomas v. County of Fairfax*, 758 F. Supp. 353, 358 (E.D. Va. 1991) (quoting *Powell v. United States Cartridge Co.*, 339 U.S. 497, 516 (1950)). *See also Schultz v. W. R. Hartin & Son, Inc.*, 428 F.2d 186, 189 (4th Cir. 1970) (FLSA creates a "presumption of coverage"). Finally, because the district court's evaluation of the issue of possible reductions in pay "is an issue of regulatory

construction, we review the district court's conclusion de novo." *Barner*, 17 F.3d at 1261 (citing *United States v. Martinez*, 7 F.3d 146, 147 (9th Cir. 1993)).

In its opinion of March 4, 1993, the district court found

> that plaintiffs still have not shown . . . that "their compensation has never in fact been reduced for a partial day's absence. Their concern is merely a theoretical argument based upon the ambiguous state policy manual that they would have been subject to pay reductions for absences of less than 8 hours if they had used up their annual leave." Accordingly, I find that plaintiffs in this case are "salaried" as defined under 29 C.F.R. § 541.118(a).

J.A. 424 (citations omitted) (footnote omitted).

Plaintiffs argue, however, "that on the record before this court the only logical conclusion is that [plaintiffs'] pay is subject to deductions for absences of less than a day." Brief of Plaintiffs at 12. According to plaintiffs, they "believed and understood that their pay was subject to deductions for absences of less than a full day if they did not have sufficient leave to cover the time missed." *Id.* at 13.

In *Abshire*, which is relied on by plaintiffs, the Ninth Circuit held that the *Abshire* plaintiffs were not "salaried" employees, even though no deductions had ever actually been made from their pay for absences of less than one day's duration. *Abshire*, 908 F.2d at 487. However, *Abshire* is distinguishable from this

case. In *Abshire*, the parties stipulated that the pay of the plaintiffs was "subject to a potential deduction for absences from work of less than a day's duration if the absence [could] not be 'covered' or paid as vacation, sick leave, or accrued compensatory time off." *Id.* at 485. No such stipulation is present in this case. Indeed, defendants argue that plaintiffs' pay is not subject to any potential deduction for absence of less than one day's work. Further, Jan Miller's affidavit denies that any such deductions have ever been made and states that, in the event such a deduction was made, it was either an error or inadvertent.

Moreover, *Martin v Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 298 (1992), relied on by plaintiffs, is also distinguishable. In *Martin*, the defendant had actually made deductions totalling $3,269.78 from plaintiffs' pay for "fractions of days that these employees missed and did not make up or charge to accrued leave time." *Id.* at 613. Accordingly, the Second Circuit concluded that the plaintiffs in *Martin* were not paid on a salary basis and that overtime payments were due and owing to them. However, in this case there is absolutely no evidence that defendants made any deductions from plaintiffs' pay for fractions of days missed.[1]

In *Michigan Ass'n of Governmental Employees v. Michigan Department of Corrections*, 992 F.2d 82 (6th Cir. 1993) (per curiam), a case virtually on point with this case, the plaintiffs, relying on the same sick leave provision as plaintiffs in this case, namely, State of Michigan's Compensation Plan, § 11 — Sick

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1. In their "Third Brief," plaintiffs state that they "do not agree that none of them have ever been docked for less that (sic) 8 hours in a day." Third Brief of Plaintiffs at 1. However, other than this conclusory statement, plaintiffs have provided no evidence that any of them have ever had their pay docked for an absence of less than eight hours.

Appendix A

Leave Standard, II.d, argued that they were entitled to overtime compensation because they were not paid on a salary basis. In this case, the MDOC submitted an affidavit from Jan Miller that was similar to the affidavit submitted by Miller in this case. *Id.* at 85.

In reaching our conclusion that the plaintiffs in *Michigan Ass'n of Governmental Employees,* were paid on a salary basis, we distinguished our holding from the holding of the Ninth Circuit in *Abshire*. We stated that

> [w]e choose to focus on the actual policy, rather than whether the policy has ever been administered, for two reasons. First, this approach is more consistent with the regulatory language defining a salaried employee . . . [and] [s]econd, focusing on the actual policy is more practical and realistic.

Michigan Ass'n of Governmental Employees, 992 F.2d at 86. Nevertheless, we concluded that two factors distinguished the situation in *Michigan Ass'n of Governmental Employees* from the situation in *Abshire*: "1) the policy language in *Abshire* was unambiguous and 2) Kern County conceded that the policy subjected the plaintiffs to pay reductions." *Id.* However, we stated in *Michigan Ass'n of Governmental Employees* that

> [t]he compensation manual does not state specifically that the plaintiffs will receive a pay reduction for absences of less than one day. Instead, the manual merely states that when "sickleave" is exhausted, "compensation reduction for the time lost shall be made for the work period in which the absence occurred." This language is far from

> dispositive, and the defendant's claim that it has always interpreted this language to apply only to absences of eight hours or more is certainly credible.

Id. Accordingly, we stated that

> [w]e disagree with the *Abshire* court's determination that actual implementation of the pay deduction policy is an irrelevant consideration. Actual application of the policy may well have been less relevant under the specific facts of *Abshire*, but in this case, where the policy language is ambiguous and the proper interpretation is disputed, application of the policy is highly relevant. The execution of the policy may shed more light on the actual policy than an ambiguous excerpt from an employee manual. In this case, the fact that no plaintiff's pay has ever been reduced for absences of less than one day supports the defendant's interpretation of its own sick leave policy.

Michigan Ass'n of Governmental Employees, 992 F.2d at 86.

We conclude that since we are interpreting the same ambiguous sick leave policy in this case as in *Michigan Ass'n of Governmental Employees*, this case, like *Michigan Ass'n of Governmental Employees*, is distinguishable from *Abshire*.[2]

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2. Following its decision in *Abshire*, the Ninth Circuit decided *Barner v. City of Novato*, 17 F.3d 1256 (9th Cir. 1992). In *Barner*, the City had a policy of deducting employee absences of less than a full day from an employee's unused

(Cont'd)

Appendix A

Plaintiffs herein have failed to present evidence that defendants' interpretation of the ambiguous sick leave policy is disingenuous

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(Cont'd)

leave time; however, if the employee had no unused leave time the decision of what to do was left to the discretion of the City Manager. the plaintiffs in *Barner* sued the City under the FLSA because they were denied overtime compensation.

The court refused to extend its holding in *Barner*, distinguishing the situation from the situation presented in *Abshire*. The Ninth Circuit stated that in *Abshire* they were "faced with an express policy of deducting from its overtime-exempt employees' pay for absences of less than a day," but no such policy existed in *Barner*. *Id.* at 1262. Accordingly, the Ninth Circuit held that "in the absence of an express policy subjecting an executive or administrative employee's pay to reduction for absences of less than one day, deducting accrued leave time is not conduct which puts the employee outside the applicable exemption." *Id.* at 1258.

The court in *Barner* also noted that it was reluctant to extend its decision in *Abshire* because the Department of Labor had issued new regulations since the *Abshire* decision. The new regulation, 29 C.F.R. § 541.5d, states:

> (a) An employee of a public agency who otherwise meets the requirements of § 541.118 shall not be disqualified from an exemption under § 541.1, 541.2 or 541.3 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced of such employee to be placed on leave without pay for absences, for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because

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(Cont'd)

or that defendants' have taken actions inconsistent with their assertion that they consider the policy language in the sick leave policy to apply only to absences of eight hours or more.

Furthermore, although plaintiffs argue that this case is distinguishable from the situation in *Michigan Ass'n of Governmental Employees*, we find their arguments unpersuasive. First, plaintiffs argue that the fact that they were subject to furloughs for four working days in August 1991 shows that they were not salaried. However, plaintiffs were furloughed for full working days, not less than a full day. Thus, the furloughs are irrelevant to the issue of whether they are salaried. Second, plaintiffs argue that the fact that they are subject to rigid attendance and timekeeping requirements is inconsistent with their being paid on a salaried basis. However, defendants, through Jan Miller, have responded that the reason for the rigid attendance and timekeeping requirements are not punitive, but (1) to permit MDOC as a public agency of the State of Michigan to account to the taxpayers of the state, and (2) to protect MDOC employees by giving MDOC a means to determine who is actually present in a facility in the event of a prison uprising or other emergency.

(Cont'd)

> (1) permission for its use has not been sought or has been sought and denied; or
>
> (2) the employee chooses to use leave without pay.

57 Fed. Reg. 37,677 (August 19, 1992). The Ninth Circuit noted that the regulation was not retroactive. *Barner*, 17 F.3d at 1263, a holding which is in accord with our holding in *Michigan Ass'n of Governmental Employees*, 992 F.2d at 84 n. 1. ("We hold that the 'public employee exception should not be applied retroactively.").

Therefore, we conclude, as we did in *Michign Ass'n of Governmental Employees,* that the ambiguous sick leave policy in this case is insufficient to alter plaintiffs' status as salaried employees exempt from the overtime requirements of the FLSA. Thus, the district court properly granted summary judgment in favor of defendants on plaintiffs' claims in Counts I and II of their second amended complaint because defendants have satisfied their burden of showing that plaintiffs fall within the bona fide executive exemption to the FLSA.

B.

Plaintiffs argue that the district court erred in ordering that no additional plaintiffs would be permitted to join this class action after July 23, 1993, the date it issued its order regarding liquidated damages and prejudgment interest and its order denying defendants' motion to alter or amend its judgment in favor of plaintiffs on Count V of the second amended complaint. Plaintiffs assert that the district court should not have excluded additional plaintiffs from opting into this action, because "the Court did not rule with respect to the primary damage issue in the case — the amount of damages the Plaintiffs were entitled to recover for the furlough claim." Brief of Plaintiffs at 17-18. The plaintiffs also assert that as of July 29, 1993, the date the district court denied Ann Marie Carlin's request to opt into the litigation as a plaintiff, the district court had ruled unfavorably on four of plaintiff's five claims, had denied liquidated damages, and had awarded prejudgment interest (but had not determined the rate of prejudgment interest). Thus, plaintiffs argue that plaintiff Carlin was not seeking to opt into an "advantageous judgment." *Id.* at 18.

On the other hand, defendants assert that none of the

plaintiffs have standing to raise this issue as they are unaffected by the district court's decision. According to defendants, the real parties in interest, those persons excluded by the district court's order are not before the court. We agree. Section 16(b) of the FLSA, 29 U.S.C. § 216(b), provides that an action for damages under the FLSA may be brought

> by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

"Unlike Fed. R. Civ. P. 23, under which a class member must 'opt out' not to be bound, a 'class' member under §16(b) must 'opt in' to be bound." *United States v. Cook*, 795 F.2d 987, 990 (Fed. Cir. 1986). Thus. Ms. Carlin is not a 'class' member to this action and is not bound by it.

Further, even assuming arguendo that plaintiffs Gannon and Jones as the class representatives had standing to raise the issue of Ms. Carlin's exclusion, we would conclude that the district court did not abuse its discretion in excluding additional plaintiffs from opting into the action after July 23, 1993. In *Roberts v. Western Airlines*, 425 F. Supp. 416 (N.D. Cal. 1976), the district court declined to allow additional employees to opt into the action under § 216(b). The district court stated:

> While § 216(b) does not specify when an employee must become a party, individuals should not be allowed to do so after judgment

> has been entered. Such a practice would allow employees to be bound when a judgment is advantageous and to be free when it is unfavorable.

Id. at 419. By the time Ms. Carlin sought to "opt in" as a plaintiff, the district court had resolved all of the issues in the case, except the amount of damages and prejudgment interest plaintiffs were entitled to as a result of their furlough for four working days in August 1991. Thus, by July 23, 1993, the time the district court stated it would no longer allow additional employees to "opt in," the employees could be assured of an advantageous decision, even though they would not know the exact amount of damages they might receive. The district court correctly concluded that to allow MDOC employees to "opt in" at that point in time would allow them to take advantage of a favorable decision, when they previously would have avoided a possibly unfavorable decision by not being, a party to this action.

C.

Plaintiffs also argue that the district court erred by denying their request for liquidated damages, costs, and attorney's fees. Plaintiffs assert that they are entitled to liquidated damages, costs, and attorney's fees because defendants violated § 207 of the FLSA, 29 U.S.C. § 207, by failing to pay them overtime compensation.

The applicable statute, 29 U.S.C. § 216(b), states in relevant part:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be

> liable to the employee or employees affected in the amount of the unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. . . .

Based upon the plain language of the statute, in order to be entitled to liquidated damages, attorney's fees, and costs, the employer must have been found to have violated § 206 or § 207 of the FLSA. Section 206 of the FLSA, 29 U.S.C. § 206, governs the applicability of the minimum wage requirements of the FLSA, a provision which is not at issue in this case. Section 207 of the FLSA, 29 U.S.C. § 207, governs the payment of overtime. However, having concluded that the district court properly granted summary judgment in favor of defendants on plaintiffs' claims for unpaid overtime, there has been no violation of § 207 in this case. Thus, the district court did not err in denying liquidated damages, costs, or attorney's fees in this case.

D.

Plaintiffs argue that the district court erred in dismissing their pendent state law claim for breach of the state's compensation plan, Count III, because their complaint presented substantial federal questions. Plaintiffs also assert that the district court erred in dismissing their pendent state law claim because their claim for overtime compensation was not meritless.

Appendix A

In dismissing the claim in Count III of plaintiffs' second amended complaint, the district court stated that "because this court has dismissed counts I, II, IV & V of plaintiffs' second amended complaint, only count III remains. Because count III is purely a state claim, breach of contract, this Court will dismiss this claim without prejudice." J.A. 416. However, the district court's statement that it had dismissed Count V of plaintiffs' second amended complaint is incorrect. Not only had the district court not dismissed Count V, it granted summary judgment for plaintiffs on Count V, a federal claim, and ultimately issued a judgment on Count V that awarded $78,527.91 in damages and interest to plaintiffs.

A district court's decision to dismiss a pendent claim is reviewed for an abuse of discretion. *Faucher v. Rodziewicz*, 891 F.2d 864, 872 (11th Cir. 1990). "A District Court may exercise pendant jurisdiction over a state law claim if the court already has jurisdiction over a 'substantial' federal claim, if the state and federal claims are derived from a 'common nucleus of operative fact,' and if the claims are such that a plaintiff 'would ordinarily be expected to try them all in one judicial proceeding.' " *Union City Barge Line Inc. v. Union Carbide Corp.*, 823 F.2d 129, 141-42 (5th Cir. 1987) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)). "Generally, 'if the federal claims are dismissed before trial . . . the state claims should be dismissed as well.' " *Taylor v. First of Am. Bank-Wayne*, 973 F.2d 1284, 1287 (6th Cir. 1992) (citing *Gibbs*, 383 U.S. at 726). "However, there is no mandatory rule." *Taylor*, 973 F.2d at 1287. "*Gibbs* 'simply recognizes that' when 'all federal claims are eliminated before trial, the balance of factors . . . under the pendent jurisdiction doctrine . . . will point toward declining to exercise jurisdiction over the remaining state-law claims.' " *Id.* (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 342, 350 n. 7 (1988)). " 'A trial

court must balance the interests . . . when deciding whether to resolve a pendent state claim on the merits.' " *Id.* (quoting *Aschinger v. Columbus Showcase Co.*, 934 F.2d 1402, 1412 (6th Cir. 1991)).

In this case, we believe that the district court abused its discretion when it dismissed plaintiffs' pendent state law claim on the grounds that it had already dismissed all of the other counts in plaintiffs' second amended complaint. In fact, the district court had found in favor of plaintiffs on one of their federal claims. Undoubtedly, since the district court had either dismissed or disposed of all of plaintiffs' federal claims prior to trial, it is conceivable that the district court could have chosen to balance the interests in this case and concluded that it should not exercise pendent jurisdiction. The district court did not do so, however, and the only ground it articulated for declining to exercise pendent jurisdiction does not support its dismissal of Count III. Accordingly, we conclude that the district court's dismissal of Count III shall be reversed and the case remanded for further consideration by the district court.[3]

E.

Plaintiffs argue that the district court erred in dismissing their claims concerning the violation of their rights under the grievance awards, Count IV, for failure to exhaust administrative remedies. Plaintiffs admit that they "had not exhausted all their administrative remedies with respect to the grievance awards at the time they commenced this action," and they admit that "the

3. On remand, the district court should first balance the interests in this case and determine whether it will exercise pendent jurisdiction over the claim set forth in plaintiffs' Count III. Because this issue is one committed to the district court's discretion, we express no opinion on the outcome of this balancing.

Appendix A

Second Amended Complaint does not expressly allege that it would have been useless to exhaust all administrative remedies," Brief of Plaintiffs at 22. Plaintiffs argue, however, that the district court should not have dismissed their claims in Count IV for failure to state a claim upon which relief could be granted "because the factual allegations of the Second Amended Complaint indicated that it would have been useless for the Plaintiffs to pursue further administrative remedies." *Id.*

In its opinion of November 12, 1992, which denied plaintiffs' motion for reconsideration of its order dismissing Count IV and denied plaintiffs' motion to file a third amended complaint adding an allegation that exhaustion of administrative remedies would be useless, the district court stated:

> Although the standard for amending pleadings is liberal, in this case amendment is not warranted. I will deny plaintiffs' motion for reasons of futility because I still do not believe that plaintiffs can meet the exception to the requirement of exhaustion of administrative remedies, which is to show that such a pursuit would be useless. *Welfare Employees Union v. Civil Service Commission*, 28 Mich. App. 343 (1970).
>
> . . . .
>
> The Civil Service Commission, Employees Relations Board (ERB) is presently considering whether the State Personnel Director has the legal authority to make "exceptions" to the Civil Service

Appendix A

> Compensation Plan in the case *Patrick Clark* and *Department of Corrections*, (HO-072-91). If this tribunal answers "no", plaintiffs' contentions under Count IV are likely to become moot.

J.A. 323-24. The district court also stated that "it may be appropriate to revisit this question after the *Patrick Clarke* (sic) case is resolved." J.A. 325.

Subsequently, on January 6, 1993, the ERB issued its decision in the *Patrick Clark* case. In the *Patrick Clark* case, the ERB found in favor of the plaintiffs. Specifically, the ERB found "no provision in the Rules or the compensation procedures for granting an 'exception' in order to deprive eligible employees of the overtime compensation to which they are entitled without due process," and the ERB "affirm[ed] the HO's [Hearing Officer's] conclusion that *Clark, et al.* are entitled to overtime pay for preshift line-up meetings." J.A. 530-31. Finally, the ERB found "that this matter was properly before the HO as a grievance appeal for the reasons stated above. Further, the Board concurs with the HO's decision to grant the grievance with retroactive relief, as specified by stipulation of the parties. . . ." J.A. 534.

Thus, in light of plaintiffs' ability to obtain relief from the ERB, we conclude that the district court did not err in dismissing plaintiffs' claims in Count IV for failure to exhaust administrative remedies. Clearly, it was not a futile or unnecessary act to require plaintiffs to exhaust their administrative remedies.[4]

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4. Defendants suggest that because plaintiffs have obtained all the relief they could have obtained from the district court as a result of the ERB's decision, their claims in Count IV are now moot. However, it is impossible to determine whether

(Cont'd)

Appendix A

F.

Plaintiffs argue that the district court erred in finding that some of the plaintiffs were not paid "on a salary basis" and thus were not entitled to recover on their claim for lost wages due to a furlough. Plaintiffs assert that the district court erred because it had previously held that all plaintiffs were paid on a salary basis. According to plaintiffs, pursuant to *Coal Resources, Inc. v. Gulf & Western Indus., Inc.*, 865 F.2d 761, 766 (6th Cir.) (per curiam), *amended*, 877 F.2d 5 (6th Cir. 1989), the district court's ruling became the law of the case and could not be relitigated in the district court.

Defendants argue that the district court did not err because the supervisor class, represented by plaintiff William T. Gannon, a captain at an MDOC correctional facility, actually consists of two classes of individuals, supervisory personnel holding the rank of captain or higher, who were treated by the State as bona fide executives exempt from the overtime requirements of the FLSA, and lieutenants and sergeants, "who were not treated by the State as exempt from the FLSA overtime requirements; who were eligible for overtime and who . . . Plaintiffs admitted were not bona fide executives, administrators or professionals." Brief of Defendants at 26.

As proof that plaintiffs have admitted that lieutenants and sergeants were not bona fide executives, defendants point to a stipulation that was attached to plaintiffs' brief concerning

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(Cont'd)
plaintiffs' claims are moot from the current state of the record before this court. Specifically, it is impossible to determine whether the ERB decision has resulted in plaintiffs being paid the retroactive overtime payments that the ERB found were due and owing to them.

damages in the district court; that stipulation read in relevant part:

> 3. The Defendant Michigan Department of Corrections will provide this information for all named Plaintiffs, however, the parties agree that those Plaintiffs holding the rank of Sergeant or Lieutenant at the time of the Furlough are not "salaried" employees as that term is defined in the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, and its implementing regulations.

J.A. 465. However, this stipulation is unsigned. Nevertheless, on March 16, 1993, the parties entered into a stipulation concerning damages that states in relevant part:

> 1. The Defendant Michigan Department of Corrections will provide the following information for each of the Plaintifts in this action *except those Plaintiffs who are eligible for overtime under the Michigan Civil Services Compensation Plan*. . . .

J.A. 469-70 (emphasis added). Prior to the time that the parties entered into their stipulation, the ERB issued its decision in *Patrick Clark*. In its decision, the ERB states that "[a]ccording to the [Michigan Civil Services] Compensation Plan, the Sergeants (CSS IV) and Lieutenants (CSS V) are eligible for overtime; the Captains CSS VI are ineligible." J.A. 525. Further, defendants also submitted to the district court the affidavit of Dinah Moore, the assistant manager of Labor Relations for MDOC. Her affidavit states in relevant part:

> [T]he members of the class plaintiffs who are

designated on the attached exhibit as "Employees Paid on a Salary Basis" are those members of this class action who are entitled to reimbursement for the furlough days under this Court's March 4,1993 Opinion and Order because they are similarly situated to Plaintiffs Jones and Gannon. Plaintiff Jones was at all times pertinent to this lawsuit, a Deputy Warden at the State Prison of Southern Michigan. In addition, Plaintiff Jones was not eligible for overtime compensation and was paid on a salary basis.

Plaintiff Gannon at all relevant times was a Captain at a correctional facility. Plaintiff Gannon is not eligible for overtime compensation and is paid on a salary basis. Members of the plaintiff classes who are similarly situated to Plaintiffs Gannon and Jones are those employees holding the rank of Captain and above, who are not entitled to overtime compensation for hours worked in excess of forty (40) hours in a work week, and who are paid on a salary basis.

7. That the employees listed in the category of "Employees Not Paid on Salary Basis" are not entitled to reimbursement for the furlough days under this Court's March 4, 1993 Opinion and Order since they are not similarly situated to the named plaintiffs, Jones and Gannon. These class members are eligible for overtime compensation for hours worked in excess of forty (40) in a work week,

> and are *not* paid on a salary basis. These employees held a rank below that of Captain at all times relevant herein.

J.A. 541-42.

In this case, we conclude that the district court did not err or violate the law of the case doctrine when it found that sergeants and lieutenants were not eligible for reimbursement for the furlough days because they were not paid on a salary basis. As is discussed below, the district court lacked authority to order the State to reimburse those plaintiffs, who were paid on a salary basis, for the wages lost due to the four day furloughs in August 1991. Thus, even were we to hold that the district court's decision did conclude that all plaintiffs were paid on a salary basis and that the district court's holding had become the law of the case, it would be of no avail to the plaintiffs who are sergeants and lieutenants.

Further, we agree with the district court that its opinion and order of March 4, 1993 dealt with plaintiffs who were similarly situated to plaintiffs Gannon and Jones; namely, plaintiffs who were not eligible for overtime because they were paid on a salary basis. Based upon evidence subsequently submitted to the district court, the court learned that there was a subclass of plaintiffs who were not similarly situated to plaintiffs Gannon and Jones because they were not paid on a salary basis and were eligible for overtime, and the district court properly distinguished their situation in its opinion and order of December 20, 1993.[5]

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5. Further, we note that we need not revisit the district court's grant of summary judgment as to counts I and II as the claims for overtime of the Sergeants and Lieutenants are now moot. In its decision of January 6, 1993, the ERB ordered that Sergeants and Lieutenants be paid the overtime they sought.

Appendix A

G.

On cross-appeal, defendants argue that the district court's application of the FLSA to require them to reimburse state employees for budget-related furloughs violates the Tenth Amendment to the Constitution of the United States. Specifically, defendants assert that the application of the FLSA to require them to reimburse state employees for furloughs imposed due to budgetary constraints violates state sovereignty by invading areas of traditional governmental functions. According to defendants, such an "application of the FLSA would deprive the State of its ability to regulate its relationship with its employees with respect to budget shortfalls." Brief of Defendants at 34. However, defendants state:

> The State does not make a blanket attack on application of the FLSA to the State in total. It is the State's position that if application of the FLSA were to require it to reimburse salaried employees for deductions made as a result of budget-required furlough days, rather than allowing the State to lose its overtime exemption for that period, the FLSA unconstitutionally regulates the State as a State in decisions related to resolving its budgetary difficulties.

Id. at 36.

In *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), the Supreme Court noted that in *Hodel v. Virginia Surface Mining & Reclamation Ass'n Inc.*, 452 U.S. 264, 287-88 & n. 29 (1981), it had summarized the prerequisites for governmental immunity. The Court stated:

> Under that summary, four conditions must be satisfied before a state activity may be deemed immune from a particular federal regulation under the Commerce Clause. First, it is said that the federal statute at issue must regulate "the 'States as States.' " Second, the statute must "address matters that are indisputably 'attribute[s] of state sovereignty.' " Third, state compliance with the federal obligation must "directly impair [the States'] ability 'to structure integral operations in areas of traditional governmental functions.' " Finally, the relation of state and federal interests must not be such that "the nature of the federal interest . . . justifies state submission."

Garcia, 469 U.S. at 537. The Court then "reject[ed], as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.' " *Id.* at 546-47. Rather, the Court stated that "[i]f there are to be limits on the Federal Government's power to interfere with state functions . . . we must look . . . to . . . the manner in which the Constitution insulates States from the reach of Congress' power under the Commerce Clause." *Id.* at 547.

Accordingly, the Court went on to hold that it "perceive[d] nothing in the overtime and minimum-wage requirements of the FLSA . . . that is destructive of state sovereignty or violative of any constitutional provision, *id.* at 554, and the Court expressly overruled its holding in *National League of Cities v. Usery*, 426 U.S. 833 (1976), in which it had held that Congress lacked

authority to impose the requirements of the FLSA on state and local governments.

In *Brinkman v. Department of Corrections of Kansas*, 21 F.3d 370 (10th Cir), *cert. denied*, 115 S. Ct. 315 (1994), the Kansas Department of Corrections challenged the district court's order that it pay actual and liquidated damages for unpaid overtime to various corrections officers on the ground that as an agency of the state, it was immune from suit under the Tenth Amendment. The Tenth Circuit rejected the argument of the Department of Corrections, stating:

> In making its Tenth Amendment argument defendant seeks to resurrect *National League of Cities v. Usery*, 426 U.S. 833 (1976) which was expressly overruled by *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985) . . . We have expressly recognized the authority of *Garcia's* holding that the Tenth Amendment is not violated by extending the FLSA to the states. *Renfro v. City of Emporia*, 948 F.2d 1529, 1541 (10th Cir. 1991), *cert. dismissed*, __ U.S. __ 112 S. Ct. 1310, 117 L.Ed.2d 510 (1992). The issue is settled; defendant's Tenth Amendment immunity argument fails.

Id. at 371 (parallel citations omitted).

Further, in *Biggs v. Wilson*, 1 F.3d 1537 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 902 (1994), the State of California challenged the district court's grant of summary judgment for defendants under the FLSA. The district court found that the State had

violated the minimum wage provisions of the FLSA by failing to issue paychecks to state workers promptly. The State failed to pay employees on their usual "payday" because the Legislature had failed to pass a budget, and a 1990 state law prevented the issuance of paychecks until a budget had been passed by the legislature and signed by the governor.

The Ninth Circuit rejected the State's argument that the district court's finding that the FLSA contains a requirement that employees be paid promptly at the end of a pay period infringed the State's sovereignty under the Tenth Amendment. The court stated:

> Assuming state officials are correct that in the absence of a budget, the state was not legally able to pay its employees, we nevertheless find that the application of the FLSA is not preempted by the Tenth Amendment. To the extent compliance with the FLSA interferes with the state budgetary process, that interference is caused by state law, not federal law. The FLSA does not require California to pass a budget on time; it only requires California to do what all employers must do — pay its employees the minimum wage on payday.

Id. at 1543.

Likewise in this case, defendants admit that the furlough days in question were the result of appropriations reductions mandated by Michigan law, not federal law, because of a revenue shortfall. Accordingly, we reject defendants' contention that

application of the FLSA to them is a violation of the Tenth Amendment.

H.

Defendants also argue that the district court erred when it found that the FLSA required them to reimburse salaried employees for the deductions made as the result of budget-required furlough days. We agree.

"In 1938 Congress enacted the Fair Labor Standards Act requiring employers covered by the Act to pay employees minimum wages plus overtime at one and one-half times their regular rate of pay for hours worked in excess of forty per work week." *Alewine v. City Council of Augusta*, 699 F.2d 1060, 1065 (11th Cir. 1983) (citing 29 U.S.C. §§ 206, 207 (1940 ed.)). In ordering defendants to reimburse plaintiffs for the deductions made as the result of budget-related furloughs, the district court relied not on the substantive provisions of the FLSA but on the Department of Labor regulation at 29 C.F.R. § 541.118(a), which states:

> (a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any

> week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

Further, 29 C.F.R. § 541.118(a)(6) provides:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

The regulations at 29 C.F.R. § 541.118 are used to determine whether a person is paid "on a salary basis" for purposes of whether he falls within the bona fide executive exemption to the requirement that overtime be paid. The regulation, 29 C.F.R. 541.118(a) does not require that an employee paid on a salary basis be paid his full salary for any week in which he performs any work without regard to the number of days or hours worked.

Rather, the regulation provides that to be considered paid "on a salary basis" a person must receive, subject to exceptions set out in other subsections of 29 C.F.R. § 541.118, "his full salary for any week in which he performs any work without regard to the number of days or hours worked."

Indeed, defendants admit that the State of Michigan "loses its overtime exemption during the workweeks in which deductions were made to Plaintiffs' salaries as a result of the budget-required furlough days." Brief of Defendants at 42. Defendants' admission is based on their contention that the facts of this case fall within the provision of 29 C.F.R. § 541.118(a)(6), which provides that when an impermissible deduction is made during a situation when there is no work available, the employer loses the bona fide executive exemption for the entire period when such deductions were made. We agree. As the district court in *Harris v. District of Columbia*, 709 F. Supp. 238 (D.D.C. 1989) stated:

> This decision is supported by a recent letter ruling of the Department of Labor's Wage and Hour Division . . . [in which] the Division effectively ruled that the frequency of . . . deductions would determine the extent of the disqualification under the regulations. The Division Concluded: "Where an occasional deduction that is not permitted by section 541.118 is made from the salary of an otherwise exempt employee, the exemption would be lost in that workweek when the deduction is made. However, if such deductions are regular and recurring, we would question whether the employee is

> actually paid 'on a salary basis' and the exemption may be denied in all workweeks in which it is claimed, including those weeks where no deduction is claimed."

Id. at 241 (quoting U.S. Dep't of Labor, Wage and Hour Division, Letter Ruling of January 15, 1986).

In this case, the furlough deductions were not regular and recurring; in fact, they were not even occasional. Rather, the furlough deductions were an isolated occurrence, necessitated by budget problems. Thus, we conclude that defendants lost the bona fide executive exemption for those workweeks in August 1991 during which they made impermissible deductions from plaintiffs' salaries. Accordingly, since we have already concluded that the district court lacked authority to order defendants to reimburse those plaintiffs who are paid on a salary basis for the four furlough days in August 1991, we shall reverse the district court's grant of summary judgment in favor of plaintiffs under Count V of their second amended complaint and remand this issue for further proceedings consistent with this opinion.

Finally, we note that the record shows that defendants furloughed plaintiffs a total of four days each, during two pay periods, i.e., four weeks, in August 1991. Thus, defendants lost the "bona fide executive" exemption during that four-week period. On remand, the district judge is directed to determine which of the plaintiffs are entitled to overtime under the regulations for the four-week period during which defendants lost their "bona fide executive" exemption.

Appendix A

III.

For the reasons stated, the district court's grant of summary judgment in favor of defendants as to Counts I and II of the second amended complaint; the district court's order that no additional class members be permitted to join the action after July 23, 1993; the district court's order denying plaintiffs' request for liquidated damages, costs and attorney's fees; the district court's order dismissing plaintiffs' state law claim for breach of the grievance awards in Count IV of the second amended complaint; and the district court's order determining that sergeants and lieutenants are not entitled to reimbursement for the budget-required furlough days are AFFIRMED. However, the district court's dismissal of plaintiff's state law claim for breach of contract in Count III, and the district court's grant of summary judgment for plaintiffs as to Count V of the second amended complaint are REVERSED, and the case is remanded to the district court for further proceedings consistent with this opinion.

APPENDIX B — UNITED STATES DISTRICT COURT JUDGMENT FILED JANUARY 21, 1994

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

File No. 5:91:CV:47

HON. RICHARD A. ENSLEN

MICHIGAN SUPERVISORS' UNION; OFFICE PROFESSIONAL EMPLOYEES INTERNATIONAL UNION; WILLIAM T. GANNON, on behalf of himself and all other similarly situated supervisory security personnel employed by Defendant; and TRAVIS JONES, on behalf of himself and all other similarly situated civilian employees of Defendant,

Plaintiffs,

v

STATE OF MICHIGAN; DEPARTMENT OF CORRECTIONS; and DEPARTMENT OF CIVIL SERVICE,

Defendants.

JUDGMENT

This matter is before the Court on the parties' stipulation, filed January 14, 1994, concerning damages to be paid with respect to Count V of the second amended complaint, as directed by this Court on December 20, 1993. Accordingly;

IT IS HEREBY ORDERED that as to Count V of the second amended complaint, **JUDGMENT** is entered **IN FAVOR**

Appendix B

OF the ninety-nine (99) plaintiffs identified in the stipulation filed January 14, 1994, and AGAINST both defendants in the total amount of $78,527.91, including prejudgment interest.

DATED in Kalamazoo, MI:
Jan 21, 1994

s/ Richard A. Enslen
Richard A. Enslen
United States District Court

APPENDIX C — UNITED STATES DISTRICT COURT OPINION, ORDER AND PARTIAL JUDGMENT FILED MARCH 4, 1993

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

File No. 5:91:CV:47

HON. RICHARD A. ENSLEN

MICHIGAN SUPERVISORS' UNION; OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION; WILLIAM T. GANNON, on behalf of himself and all other similarly situated supervisory security personnel employed by Defendant; and TRAVIS JONES, on behalf of himself and all other similarly situated civilian employees of Defendant,

Plaintiffs,

v

STATE OF MICHIGAN; DEPARTMENT OF CORRECTIONS; and DEPARTMENT OF CIVIL SERVICE,

Defendants.

OPINION

This case is before the Court on the parties' cross-motions for partial summary judgment under Federal Rule of Civil Procedure 56. Specifically, each side believes that it is entitled to judgment on counts I & II of plaintiffs' second amended complaint. The underlying dispute is an action for recovery of unpaid overtime compensation pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* This case is

brought as a class action under section 16 of the FLSA, 29 U.S.C. § 216.

Facts

Plaintiffs are employees of the Michigan Department of Corrections. There are two classes of employees in this action. Specifically, one class consists of supervisors of security personnel in correctional institutions ("Supervisors"). The other class consists of civilian employees of the Department of Corrections ("Civilians"). The plaintiffs are divided into two classes because, as alleged, they are entitled to overtime pay at different rates. That is, it is alleged that civilians may receive overtime pay at a rate of one-and-one-half times their regular hourly rate in excess of forty in a work week. Supervisors can only receive overtime pay for hours worked in excess of eighty-six (86) in a fourteen day pay period. 29 U.S.C. § 207(k).

Plaintiffs argue that they are entitled to judgment as a matter of law on counts I & II of their complaint because they are not exempt from FLSA protection. As the parties concede, whether plaintiffs are exempt from FLSA protection is the threshold question in this motion. If I find that plaintiffs are exempt under the FLSA, then, as a matter of law, defendants will be granted judgment as to counts I & II. If, on the other hand, I find that plaintiffs are not exempt, then, the next question I must examine is whether defendants "willfully" violated the FLSA (and whether I can make a decision on this question as a matter of law).

Standard

In reviewing a motion for summary judgment pursuant to Rule 56, this Court should only consider the narrow questions of

whether there are "genuine issues as to any material fact and [whether] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). On a Rule 56 motion, the Court cannot resolve issues of fact, but is empowered to determine only whether there are issues in dispute to be decided in a trial on the merits. *Gutierrez v. Lynch*, 826 F.2d 1534, 1536 (6th Cir. 1987); *In re Atlas Concrete Pipe Inc.*, 668 F.2d 905, 908 (6th Cir. 1982). The crux of the motion is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 251-52 (1986); *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1310 (6th Cir. 1989).

A motion for summary judgment requires this Court to view " 'inferences to be drawn from the underlying facts . . . in the light most favorable to the party opposing the motion.' " *Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)), *quoted in Historic Preservation Guild v. Burnley*, 896 F.2d 985, 993 (6th Cir. 1989). On the other hand, the opponent has the burden to show that a "rational trier of fact [could] find for the non-moving party [or] that there is a '*genuine issue for trial.*' " *Historic Preservation*, 896 F.2d at 993 (quoting *Matsushita*, 475 U.S. 587).

As the Sixth Circuit has recognized and consistently emphasized, recent Supreme Court decisions encourage the granting of summary judgments where there are no material facts in dispute. *Historic Preservation*, 896 F.2d at 993 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)). The courts have noted that the summary judgment motion may be an "appropriate avenue for the

'just, speedy and inexpensive determination' of a matter." *Cloverdale Equipment Co. v. Simon Aerial, Inc.*, 869 F.2d 934, 937 (6th Cir. 1989) (quoting *Celotex*, 477 U.S. at 327). Consistent with the concern for judicial economy, "the mere existence of a scintilla of evidence in support of the [non-moving party's] positions will be insufficient." *Anderson*, 477 U.S. at 252. "Mere allegations do not suffice." *Cloverdale*, 869 F.2d at 937. "[T]he party with the burden of proof at trial is obligated to provide concrete evidence supporting its claims and establishing the existence of a genuine issue of fact," *Id.*

Discussion

As discussed above, the threshold issue here is whether plaintiffs are exempt from protection under the FLSA. As the parties state, the answer to this question in this case turns on whether plaintiffs are paid "on a salary basis" as defined under 29 C.F.R. § 541.118(a). "Salary basis" is defined under this section as:

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of his work performed.

Id.

Plaintiffs allege that they are not paid "on a salary basis"

because (1) their pay is subject to reductions for absences of less than one day's duration; and (2) they are subject to rigid attendance and timekeeping requirements indicative of non-salaried status.

Defendants respond plaintiffs are paid on a salary basis because any reduction in pay for absences of less than one day's duration is "only theoretical." Defendants' Brief at 9. That is, defendants assert that plaintiffs' pay has never been reduced because of absences of less than a day. Plaintiffs do not dispute this fact.

As both parties point out, exemptions to the FLSA are to be narrowly construed in order to further Congress' goal of providing broad federal employment protection. *Mitchell v. Lublin McGaughy & Assoc.*, 358 U.S. 207, 211 (1959). Employers who claim that an exemption applies to their employees not only have the burden of proof, *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974), buy they must show that the employees fit "plainly and unmistakenly within [the exemption's] terms." *Arnold v. Ben Kanowsky Inc.*, 361 U.S. 388, 392 (1960).

The issue in this motion boils down to the following: does a public employee have to show that his/her pay was reduced of absences of less than a day in order to be considered a non-salary employee under the FLSA (and federal regulations promulgated thereunder) — or — is it enough for the public employee to show that there is a theoretical chance that he/she could be subject to pay reduction for absences of less than one day? A number of courts have addressed this issue with varying outcomes. For instance, in *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), the Ninth Circuit held that plaintiffs were not paid "on a

salary basis" because their pay was subject to reduction for absences of less than one day even though no such deductions had ever been made. *Id.* at 487; *see also Martin v. Malcome Pirnie Inc.*, 949 F.2d 611, 616-17 (2d Cir. 1991); *Banks v. City of North Little Rock*, 708 F. Supp. 1023, 1024 (E.D. Ark. 1988); *Hawks v. City of Newport News*, 707 F. Supp. 212, 215 (E.D. Va. 1988); *Knecht v. City of Redwood City*, 683 F. Supp. 1307, 1311 (N.D. Cal. 1987).

On the other hand, in *Atlanta Professional Fire Fighters v. Atlanta*, 920 F.2d 800 (11th Cir. 1991), a city ordinance required that all employees' compensation be decreased for arriving late or for violating other bureau regulations. Notwithstanding this unambiguous language, the Eleventh Circuit held that because captains of the fire department had never in fact suffered a reduction in pay due to the lost time of less than a full day, they are paid on a "salary basis." *Id.* at 805; *see also Harris v. District of Columbia*, 709 F. Supp. 238, 241 (D.D.C. 1989); *D.C. Nurses Ass'n v. District of Columbia*, 29 Wage & Hour Cas. (BNA) 868 (D.D.C. 1988); *Michigan Ass'n of Governmental Employees v. Michigan Dept. of Corrections*, No. 5:91-CV-90 (W.D. Mich. 1992) (Judge Bell) (hereinafter "*M.A.G.E.*").

The Sixth Circuit has not addressed this issue. However, Judge Bell, my colleague in the Western District of Michigan, has held in accord with the *Atlanta Firefighters* line of cases cited, *supra*. Judge Bell distinguished *Abshire* by noting that there was "clear policy language and the consensus that the employees would be subject to a reduction in pay for less than a day's absence (in *Abshire*)." In other words, unlike *M.A.G.E.*, the reduction in pay for less than a day's absence was not theoretical in *Abshire*.

Appendix C

Interestingly, in *M.A.G.E.*, Judge Bell examined a large part of the evidence that is before this Court.[1] Specifically, Judge Bell considered the Michigan Civil Service Compensation Manual and an affidavit of Jan Miller, Director of Labor Relations for the Michigan Department of Corrections, in rendering his decision that reduction in pay was only theoretical for the *M.A.G.E.* plaintiffs.

In the case before the Court, the parties have also submitted for my consideration the Michigan Civil Service Compensation Manual and an affidavit of Jan Miller. Plaintiffs here have submitted additional information that Judge Bell probably did not have before him, including affidavits of Travis Jones (civilian employee with the Department of Corrections) and William Gannon (supervisor with the Department of Corrections); an Employee Handbook for the Department of Corrections; a policy directive and memo. Plaintiffs suggest that all of this information goes to the proposition that they were not salaried employees.

After reviewing this material, the Court finds that plaintiffs still have not shown, in Judge Bell's words, that "their compensation has never *in fact* been reduced for a partial day's absence. Their concern is merely a theoretical argument based upon the ambiguous state policy manual that they would have been subject to pay reductions for absences of less than 8 hours if they had used up their annual leave."[2] *M.A.G.E.* at 4.

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1. The parties in *M.A.G.E.* were nearly identical to the parties in the case before this Court: Department of Corrections employees (plaintiffs) and the Michigan Department of Corrections (defendant).

2. I find Judge Bell's opinion persuasive. Although judges within the same district are not bound by each other's opinions as a matter of law, departure from an intra-district precedent is not to be taken lightly. I, therefore, see no reason to accept plaintiffs' invitation to create an intra-district conflict.

Appendix C

Accordingly, I find that plaintiffs in this case are "salaried" as defined under 29 C.F.R. § 541.118(a). Thus, they are exempt under the FLSA. Defendants' motion for summary judgment as to counts I & II is granted.[3]

Dated in Kalamazoo, MI:
March 4, 1993

s/ Richard A. Enslen
RICHARD A. ENSLEN
United States District Judge

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3. I note that the parties have brought to the Court's attention a relatively recent Department of Labor regulation adopted on September 6, 1991. *See* 29 C.F.R. § 541.5d. This rule provides that public employees who otherwise qualify as "salary basis" employees and are exempt from the overtime provisions of the FLSA will not be disqualified from their exemption solely because they are subject to a pay reduction for lost time of less than a day's duration. Plaintiffs argue that at least two district courts have held this rule to be in violation of the Administrative Procedures Act, 5 U.S.C. § 553(b) & (c). *See, e.g., Service Employees Int'l Union, Local 102 v. County of San Diego*, 784 F. Supp. 1503 (S.D. Cal. 1992). Plaintiffs here have not explicitly argued (or presented evidence) that this regulation is invalid. Because the parties have not briefed the question whether this regulation is valid, I will not rule on this issue. Additionally, because I have ruled against plaintiffs under 29 C.F.R. § 541.118(a), I need not reach this issue.

Appendix C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

File No. 5:91:CV:47

HON. RICHARD A. ENSLEN

MICHIGAN SUPERVISORS' UNION; OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION; WILLIAM T. GANNON, on behalf of himself and all other similarly situated supervisory security personnel employed by Defendant; and TRAVIS JONES, on behalf of himself and all other similarly situated civilian employees of Defendant,

Plaintiffs,

v

STATE OF MICHIGAN; DEPARTMENT OF CORRECTIONS; and DEPARTMENT OF CIVIL SERVICE,

Defendants.

ORDER AND PARTIAL JUDGMENT

In accordance with the Opinion entered this date;

IT IS HEREBY ORDERED that plaintiffs' motion for partial summary judgment, filed July 23, 1992 (dkt. #48), is **DENIED**;

IT IS FURTHER ORDERED that defendants' motion for partial summary judgement, filed August 20, 1992 (dkt. #51), is **GRANTED**;

Appendix C

IT IS FURTHER ORDERED that **JUDGMENT** is granted in favor of all defendants and against all plaintiffs as to count I and count II.

DATED in Kalamazoo, MI:
March 4, 1993

s/ Richard A. Enslen
RICHARD A. ENSLEN
U.S. District Judge

APPENDIX D — UNITED STATES DISTRICT COURT OPINION, ORDER AND PARTIAL JUDGMENT FILED MARCH 4, 1993

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

File No. 5:91:CV:47

HON. RICHARD A. ENSLEN

SUPERVISORS' UNION; OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION; WILLIAM T. GANNON, on behalf of himself and all other similarly situated supervisory security personnel employed by Defendant; and TRAVIS JONES, on behalf of himself and all other similarly situated civilian employees of Defendant,

Plaintiffs,

v

STATE OF MICHIGAN; DEPARTMENT OF CORRECTIONS; and DEPARTMENT OF CIVIL SERVICE,

Defendants.

OPINION

This case is before the Court on the parties' cross-motions for partial summary judgment under Federal Rule of Civil Procedure 56. Specifically, each side believes that it is entitled to judgment on count V of plaintiffs' second amended complaint. The underlying dispute is an action for recovery of unpaid overtime compensation pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* This case is brought as a class

action under section 16 of the FLSA, 29 U.S.C. § 216.

The facts of this dispute are well-known by the parties and need not be recited at this time.

Standard

In reviewing a motion for summary judgment pursuant to Rule 56, this Court should only consider the narrow questions of whether there are "genuine issues as to any material fact and [whether] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). On a Rule 56 motion, the Court cannot resolve issues of fact, but is empowered to determine only whether there are issues in dispute to be decided in a trial on the merits. *Gutierrez v. Lynch*, 826 F.2d 1534, 1536 (6th Cir. 1987); *In re Atlas Concrete Pipe, Inc.*, 668 F.2d 905, 908 (6th Cir. 1982). The crux of the motion is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986); *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1310 (6th Cir. 1989).

A motion for summary judgment requires this Court to view " 'inferences to be drawn from the underlying facts . . . in the light most favorable to the party opposing the motion.' " *Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)), *quoted* in *Historic Preservation Guild v. Burnley*, 896 F.2d 985, 993 (6th Cir. 1989). On the other hand, the opponent has the burden to show that a "rational trier of fact [could] find for the non-moving party [or] that there is a '*genuine issue for trial.*' " *Historic Preservation*, 896 F.2d at 993 (quoting *Matsushita*, 475 U.S. 587).

Appendix D

As the Sixth Circuit has recognized and consistently emphasized, recent Supreme Court decisions encourage the granting of summary judgments where there are no material facts in dispute. *Historic Preservation*, 896 F.2d at 993 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242 (1986)). The courts have noted that the summary judgment motion may be an "appropriate avenue for the 'just, speedy and inexpensive determination' of a matter." *Cloverdale Equipment Co. v. Simon Aerials, Inc.*, 869 F.2d 934, 937 (6th Cir. 1989) (quoting *Celotex*, 477 U.S. at 327). Consistent with the concern for judicial economy, "the mere existence of a scintilla of evidence in support of the [non-moving party's] positions will be insufficient." *Anderson*, 477 U.S. at 252. "Mere allegations do not suffice." *Cloverdale*, 869 F.2d at 937. "[T]he party with the burden of proof at trial is obligated to provide concrete evidence supporting its claims and establishing the existence of a genuine issue of fact." *Id.*

Discussion

Plaintiffs assert in count V of their amended complaint that, if this Court determines that they are paid "on a salary basis" under 29 C.F.R. § 541.118(a), then, as a matter of law, they are entitled to compensation for wages lost due to a four day, mandatory layoff in August 1991 (the "Furlough"). Defendants do not dispute that plaintiffs were laid off, without pay, for a period of less than one full workweek, in August 1991. *See* Defendants' Answer to Second Amended Complaint at ¶ 35. It is also undisputed that plaintiffs were "ready, willing and able" to work at the time of the Furlough. *See* Plaintiffs' Brief at Exhibit C. The plaintiffs performed work during a portion of the workweek which they were laid off. *Id.*

Appendix D

Under 29 C.F.R. § 541.118(a), plaintiffs argue that an employer is prohibited from reducing the wages of a salaried employee in any workweek in which the employee performs work. Specifically, this section provides, in relevant part:

> (a) An employee will be considered to be paid "on salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, ***the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked.*** This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

Id. (emphasis added).

As plaintiffs correctly point out, on its face, this regulation stands for the proposition that, if a salaried employee works at all in a workweek — one minute, one hour or one day, s/he is entitled to receive his or her full salary for that week. The only exception to this rule appears in 29 C.F.R. § 541.118(a)(2):

> (2) Deductions may be made, however, when the employee absents himself for work for a

> day or more ***for personal reasons, other than sickness accident.*** Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be effected if deductions are made from his salary for such absences.

(emphasis added).

Here, plaintiffs worked at least one day in the week of the furlough. *See* Affidavit of Carol Shaffer (dkt. #86). Moreover, the plaintiffs were "ready, willing and able" to work in the week in question. *Id.* It is clear that the August 1991 furlough was the only reason for plaintiffs' absence. Defendants have not offered any evidence to rebut these facts. The primary argument presented by defendants is that a new regulation, finalized by the Department of Labor in September 1992 (it was originally published in September 1991), provides that budget-required furloughs do not disqualify an employee from being paid on a salary basis "except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced." 57 Fed. Reg. 37,666 (1992) (to be codified at 29 C.F.R. § 541.5d(b)). Thus, according to defendants, plaintiffs are not entitled to compensation for wages lost due to the furlough.

This argument does not succeed, however, because the new regulation is a substantive change from existing law. Accordingly, I find that it cannot be applied retroactively. In support of this finding, I have relied in part on the analysis in *Alex v. California*, 30 Wage & Hour Cas. (BNA) 1353, 1360 (E.D. Cal. 1992). *See also Helvering v. R.J. Reynolds Tobacco Co.*, 306 U.S. 110 (1939) (substantive changes in administrative regulations cannot be applied retroactively); *Arizona Grocery Co. v. Atchison*

T & S.F.R. Co., 284 U.S. 370 (1932) (same). Defendants do not provide any legal authority to the contrary.

Thus, plaintiffs' motion for summary judgment as to count V is granted. Nonetheless, the issue of damages as to count V still remains. I will ask plaintiffs to file a brief with supporting affidavits and/or other material on this issue. Defendants may respond to plaintiffs' brief (to which plaintiffs can reply). However, it would be ideal if the parties could stipulate as to damages on this issue. If the parties can not come to an agreement on the damages issue, the parties are instructed to follow a briefing schedule laid out in the Order appended to this Opinion.

Finally, because this Court has dismissed counts I, II, IV & V of plaintiffs' second amended complaint, only count III remains. Because count III is purely a state claim, breach of contract, this Court will dismiss this claim without prejudice. *See United-Mine Workers of America v. Gibbs*, 383 U.S. 715, 722 (1966); *Wal-Juice Bar, Inc. v. Elliott*, 899 F.2d 1502, 1503 (6th Cir. 1990).

DATED in Kalamazoo, MI:
March 4, 1993

s/ Richard A. Enseln
RICHARD A. ENSLEN
U.S. District Judge

Appendix D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

File No. 5:91:CV:47

HON. RICHARD A. ENSLEN

MICHIGAN SUPERVISORS' UNION; OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION; WILLIAM T. GANNON, on behalf of himself and all other similarly situated supervisory security personnel employed by Defendant; and TRAVIS JONES, on behalf of himself and all other similarly situated civilian employees of Defendant,

Plaintiffs,

v

STATE OF MICHIGAN; DEPARTMENT OF CORRECTIONS; and DEPARTMENT OF CIVIL SERVICE,

Defendants.

ORDER AND PARTIAL JUDGMENT

In accordance with the Opinion entered this date;

IT IS HEREBY ORDERED that defendants' motion for partial summary judgment as to count V of plaintiffs' second amended complaint, filed January 28, 1993 (dkt. #76), is **DENIED**;

IT IS FURTHER ORDERED that plaintiffs' motion for partial summary judgment as to count V of plaintiffs' second

Appendix D

amended complaint, filed February 1, 1993 (dkt. #78), is **GRANTED;**

IT IS FURTHER ORDERED that judgment is **GRANTED** in favor of all plaintiffs and against all defendants as to count V of plaintiffs' second amended complaint;

IT IS FURTHER ORDERED that plaintiffs shall submit to this Court within fourteen days of this Order, a brief with supporting affidavits and/or other material on the issue of damages as to count V. Defendants may file a response brief on the damages issue no later than fourteen days after receiving plaintiffs' brief on this issue. Plaintiffs may reply to defendants' response within seven days of receiving defendants' response brief;

IT IS FURTHER ORDERED that count III of plaintiffs' second amended complaint is **DISMISSED without prejudice.**

DATED in Kalamazoo, MI:
March 4, 1993

s/ Richard A. Enseln
RICHARD A. ENSLEN
U.S. District Judge

APPENDIX E — UNITED STATES DISTRICT COURT OPINION AND ORDER FILED JULY 23, 1993

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

File No. 5:91:CV:47

HON. RICHARD A. ENSLEN

MICHIGAN SUPERVISORS' UNION; OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION; WILLIAM T. GANNON, on behalf of himself and all other similarly situated supervisory security personnel employed by Defendant; and TRAVIS JONES, on behalf of himself and all other similarly situated civilian employees of Defendant,

Plaintiffs,

v

STATE OF MICHIGAN; DEPARTMENT OF CORRECTIONS; and DEPARTMENT OF CIVIL SERVICE,

Defendants.

OPINION

This case is before the Court on defendants' motion to strike class plaintiffs who filed consents to join this action after March 4, 1993. The underlying dispute is an action for recovery of unpaid overtime compensation pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*. This case is brought as a class action under section 16 of the FLSA, 29 U.S.C. § 216.

Appendix E

The facts of this dispute are well-known by the parties and the Court.

Discussion

In their motion defendants argue that this Court should not allow additional plaintiffs to join the class. In support of this position, defendants cite to *Roberts v. Western Airlines*, 425 F. Supp. 416 (N.D. Cal. 1976). This case addressed the question whether under the Equal Pay Act of 1963, 29 U.S.C. § 206(d), additional plaintiffs should be allowed to join a class action after judgment had been entered in the case.[1] The *Western Airlines* court refused to allow additional plaintiffs to "opt-in" to the class action based on the following logic:

> While § 216(b) does not specify when an employee must become a party, individuals should not be allowed to do so after judgment has been entered. Such a practice would allow employees to be bound when a judgment is advantageous and to be free when it is unfavorable.

Id. at 419.

This decision makes sense to this Court. However, as plaintiffs point out, *Western Airlines* is clearly distinguishable from this case. Here, unlike *Western Airlines*, a number of issues are still pending such that it is unclear whether the final judgment in this case will, or will not, be advantageous to potential

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1. The provision for maintaining a class action under the Equal Pay Act is the same as that applicable to a class action suit under the FLSA, 29 U.S.C. § 216(b).

plaintiffs. For instance, the issue of damages is still pending, as well as the issue whether this Court should alter or amend its March 4, 1993 Opinion and Order. As such, there is much uncertainty as to benefits of joining this dispute.

Accordingly, this Court will deny defendants' motion. However, no more plaintiffs will be allowed to join the class *after* this Court signs its opinions on the issue of damages and the motion to alter or amend. After these two issues are resolved, then the *Western Airlines* rule will clearly be applicable to this case.[2]

DATED in Kalamazoo, MI:
July 22, 1993

s/ Richard A. Enslen
RICHARD A. ENSLEN
US. District Judge

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2. For the record, I note that as of May 17, 1993 only twenty-one additional plaintiffs have joined this action.

Appendix E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

File No. 5:91:CV:47

HON. RICHARD A. ENSLEN

MICHIGAN SUPERVISORS' UNION; OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION; WILLIAM T. GANNON, on behalf of himself and all other similarly situated supervisory security personnel employed by Defendant; and TRAVIS JONES, on behalf of himself and all other similarly situated civilian employees of Defendant,

Plaintiffs,

v

STATE OF MICHIGAN; DEPARTMENT OF CORRECTIONS; and DEPARTMENT OF CIVIL SERVICE,

Defendants.

ORDER

In accordance with the Opinion entered this date;

IT IS HEREBY ORDERED that defendants' motion to strike plaintiffs who filed consents to join action after March 4, 1993, filed May 5, 1993 (dkt. #109), is **DENIED.**

DATED in Kalamazoo, MI:
July 22, 1993

s/ Richard A. Enslen
RICHARD A. ENSLEN
U.S. District Judge

APPENDIX F — UNITED STATES DISTRICT COURT OPINION AND ORDER FILED JULY 23, 1993

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

File No. 5:91:CV:47

HON. RICHARD A. ENSLEN

MICHIGAN SUPERVISORS' UNION; OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION; WILLIAM T. GANNON, on behalf of himself and all other similarly situated supervisory security personnel employed by Defendant; and TRAVIS JONES, on behalf of himself and all other similarly situated civilian employees of Defendant,

Plaintiffs,

v

STATE OF MICHIGAN; DEPARTMENT OF CORRECTIONS; and DEPARTMENT OF CIVIL SERVICE,

Defendants.

OPINION

This case is before the Court on the issue of damages. This issue was raised by the Court. Presently pending before the Court are three damages issues: (1) whether plaintiffs are entitled to liquidated damages under 29 U.S.C. § 216(b); (2) whether plaintiffs, or defendants, are entitled to attorney fees and costs; and (3) whether plaintiffs are entitled to prejudgment interest.

Appendix F

The underlying dispute is an action for recovery of unpaid overtime compensation pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*. This case is brought as a class action under section 16 of the FLSA, 29 U.S.C. § 216.

The facts of this dispute are well-known by the parties and the Court.

Discussion

Liquidated Damages Attorney Fees

Both liquidated damages and attorney fees are covered under 29 U.S.C. § 216(b). This provision provides, in relevant part,

> (b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. . . .

Defendants argue, persuasively, that this section *only* applies to awards under sections 206 or 207 of title 29, United States Code. Because no judgment has been entered against defendants with respect to either of these sections (which plaintiffs concede),

plaintiffs are not entitled to liquidated damages or attorney fees and costs.[1]

This Court reads section 216(b) the same way as defendants. The plain language of this statute makes clear that liquidated damages, as well as attorney fees and costs, shall be awarded only if sections 206 or 207 have been violated. In this case, there is no such violation. Accordingly, the Court will not award plaintiffs liquidated damages, or attorney fees and costs under section 216(b).[2]

Prejudgment Interest

Finally, plaintiffs seek prejudgment interest on their backpay award. In response, defendants argue that such an award is prohibited. To support this position, defendants refer to two Fifth Circuit opinions (one from a district court in the Fifth Circuit). *Peters v. City of Shreveport*, 818 F.2d 1148, 1168 (5th Cir. 1987); *Dalheim v. KDFW-TV*, 712 F. Supp. 533, 542 (E.D. Tex. 1989). Defendants read these cases to hold that if a court denies liquidated damages under section 216(b), then it must per se not award prejudgment interest.

I disagree with defendants' reading of these cases. These

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1. For the most part, plaintiffs did not respond to this argument, with the exception of one paragraph in their brief on damages. They have supplied the Court with no law, or other legal argument, as to why liquidated damages and attorney fees and costs are not limited to violations under section 206 or 207.

2. I note that defendants also seek attorney fees and costs under section 216(b). In support of this request, defendants cite *Matthews v. Allis-Chalmers*, 769 F.2d 1215 (7th Cir. 1985). However, given that defendants are not a "prevailing party" in this case, attorneys fees and costs are not warranted.

cases suggest that, in the Fifth Circuit — which has an extremely unique rule with respect to liquidated damages — prejudgment interest cannot be used as a substitute for liquidated damages. This rule, however, stems from the unusual liquidated damages rule in the Fifth Circuit. As the *Peters* court stated, "indeed, while every circuit permits prejudgment interest to be awarded under the FLSA, no circuit seems to have adopted our distinction between cases brought under sections 216 and 217." *Peters*, 818 F.2d at 1169. Moreover, *Peters* cites numerous cases which stand for the exact opposite position argued by defendant. For instance, in *Ford v. Alfaro*, 785 F.2d 835, 842 (9th Cir. 1986) (cited in note 15 of the *Peters* decision), the Ninth Circuit held that it was an "abuse of discretion" for a court to *not* include prejudgment interest when there was no liquidated damages award. *See also McClanahan v. Mathews*, 440 F.2d 320, 324-26 (6th Cir. 1971); *Donovan v. Sovereign Sec., Ltd.*, 726 F.2d 55, 58 (2d Cir. 1984) ("[I]t is ordinarily an abuse of discretion not to include pre-judgment interest in a back-pay award under the FLSA.").

Notwithstanding defendants' flawed argument to the contrary, it appears clear to this Court that plaintiffs are entitled to prejudgment interest "in harmony with the Sixth Circuit's observations in *Equal Employment Opportunity Comm'n v. Wooster Brush Co. Employees Relief Ass'n*, 727 F.2d 566, 578-79 (6th Cir. 1984)." *Colunga v. Young*, 722 F. Supp. 1479, 1485 (W.D. Mich. 1989). As such, pre-judgment interest shall be included in the total damage award.

Conclusion

In light of this Court's decisions with respect to damages, defendants' motion to alter or amend, and defendants' motion to strike new class plaintiffs, the parties should be able to stipulate

to a total damages award. I will order the parties to submit a stipulation within fourteen days of the date of this Opinion and Order. If the parties cannot stipulate to this issue, then, the parties shall inform the Court of the reason(s) why this stipulation can not be agreed to.

DATED in Kalamazoo, MI:
July 22, 1993

s/ Richard A. Enslen
RICHARD A. ENSLEN
U.S. District Judge

Appendix F

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

File No. 5:91:CV:47

HON. RICHARD A. ENSLEN

MICHIGAN SUPERVISORS' UNION; OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION; WILLIAM T. GANNON, on behalf of himself and all other similarly situated supervisory security personnel employed by Defendant; and TRAVIS JONES, on behalf of himself and all other similarly situated civilian employees of Defendant,

Plaintiffs,

v

STATE OF MICHIGAN; DEPARTMENT OF CORRECTIONS; and DEPARTMENT OF CIVIL SERVICE,

Defendants.

ORDER

In accordance with the Opinion entered this date;

IT IS HEREBY ORDERED that plaintiffs' request for liquidated damages under 29 U.S.C. § 216(b), is **DENIED**;

IT IS FURTHER ORDERED that plaintiffs' request for attorney fees and costs under 29 U.S.C. § 216(b), is **DENIED**;

Appendix F

IT IS FURTHER ORDERED that plaintiffs' request for prejudgment interest under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, is **GRANTED**;

IT IS FURTHER ORDERED that the parties shall submit to this Court within fourteen days of this Order a stipulation detailing the total damages award in accordance with the Opinions of this Court issued in this case.

DATED in Kalamazoo, MI:
July 22, 1993

s/ Richard A. Enslen
RICHARD A. ENSLEN
U.S. District Judge

APPENDIX G — UNITED STATES DISTRICT COURT OPINION AND ORDER FILED JULY 23, 1993

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

File No. 5:91:CV:47

HON. RICHARD A. ENSLEN

MICHIGAN SUPERVISORS' UNION; OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION; WILLIAM T. GANNON, on behalf of himself and all other similarly situated supervisory security personnel employed by Defendant; and TRAVIS JONES, on behalf of himself and all other similarly situated civilian employees of Defendant,

Plaintiffs,

v

STATE OF MICHIGAN; DEPARTMENT OF CORRECTIONS; and DEPARTMENT OF CIVIL SERVICE,

Defendants.

OPINION

This case is before the Court on defendants' motion to alter or amend the judgment in this case entered on March 4, 1993 with respect to Count V of plaintiffs' second amended complaint. The underlying dispute is an action for recovery of unpaid overtime compensation pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*. This case is brought as a class action under section 16 of the FLSA, 29 U.S.C. § 216.

Appendix G

The facts of this dispute are well-known by the parties and the Court.

Standard

The motion before the Court is a motion to alter judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. The motion is commonly referred to as a motion for reconsideration and is properly treated as such.[1] *Smith v. Hudson*, 600 F.2d 60, *cert. dismissed*, 444 U.S. 986, 100 S. Ct. 495, 62 L. Ed. 2d 415 (1979). *See also Foman v. Davis*, 371 U.S. 178, 181, 83 S. Ct. 227, 229, 9 L. Ed. 2d 222 (1962); *Huff v. Metropolitan Life Insurance Co.*, 675 F.2d 119 (6th Cir. 1982).

In considering a motion for reconsideration, the Court is mindful that such motions are to be "served not later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e). The Court is further mindful that motions of this kind should be granted only in limited circumstances, that the final granting or denial is within the informed discretion of the Court, and that the Court's final ruling is reversible only upon a showing of abuse. *United States Labor Party v. Oremus*, 619 F.2d 683, 692 (7th Cir. 1980); *See also Hopkins v. Coen*, 431 F.2d 1055, 1059 (6th Cir. 1970); *Milwee v. Peachtree Investment Co.*, 510 F. Supp. 284, 289-90 (E.D. Tenn. 1978).

Discussion

In this Court's March 4, 1993 Opinion, I determined that

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1. This is not to be confused with the a Motion for Reconsideration pursuant to Rule 72(a), which specifically deals with the reconsideration of a magistrate's nondispositive order.

because plaintiffs are paid "on a salary" basis as defined under the FLSA, the August 1991 mandatory budget-related lay off of plaintiffs was in violation of the FLSA. The Court ordered defendants to reimburse plaintiffs for any wage loss due to the furlough. In their motion to alter or amend judgment, defendants request that this Court rule that defendants need not reimburse plaintiffs for the lost wages and that the result of defendants violation of the FLSA is a suspension of plaintiffs' overtime exempt status for the period of the furlough.

In support of this argument, defendants refer to 29 C.F.R. § 541.118(6), which provides:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

Defendants argue that this regulation stands for the proposition that if the state reimburses plaintiffs for the furlough

days, it will not lose its exemption *for that period*. Alternatively, if the state does not reimburse plaintiffs for the furlough, it would lose the overtime exemption *for that period only* (e.g., during the four days of the furlough), when such deductions were made from plaintiffs' pay.

I disagree with defendants' interpretation of § 541.118(6). Reading this regulation as defendants suggest would render the FLSA meaningless. Under this interpretation, an employer could lay off its salaried employees for less than a full work week and the employees' recovery would be limited to overtime pay for the balance of that work week. It is difficult to imagine that an employee could work enough hours in the balance of a work week during which the employee was laid off to be entitled to overtime pay in light of the fact that the FLSA requires overtime pay for nonexempt employees for all hours worked in excess of 40 in a work week. 29 U.S.C. § 207; 29 C.F.R. § 531.37.

Additionally, I find that § 541.118(6) on its face does not support defendants' position. This regulation expressly provides that where deductions are made for reasons other than lack of work the exemption is lost unless the employer reimburses the employee. The furlough here was not imposed for lack of work. As such, the exemption will be lost *in toto*, not just for "the period only," if defendants fail to reimburse plaintiffs.

Finally, defendants argue that enforcing the FLSA regulations is not proper in this case because such enforcement would prohibit the state from controlling its budget. Defendants assert that a ruling to the contrary would violate the Tenth Amendment to the United States Constitution.

Again, this Court disagrees in light of *Garcia v. San Antonio*

Metropolitan Transit Authority, 469 U.S. 528 (1985). In *Garcia*, the Supreme Court held that application of the FLSA to public employers did not exceed the limits of the federal government's power to interfere with state functions. The *Garcia* Court stated, "we perceive nothing in the overtime and minimum-wage requirements of the FLSA ... that is destructive of state sovereignty or violative of any constitutional provision. [The employer] faces nothing more than the same minimum-wage and overtime obligation that hundreds of thousands of other employers, public as well as private, have to meet." *Id.* at 554.

Accordingly, for all the reasons stated above, defendants' motion to alter or amend judgment under Rule 59(e) is denied.

DATED in Kalamazoo, MI:
July 22, 1993

s/ Richard A. Enslen
RICHARD A. ENSLEN
U.S. District Judge

Appendix G

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

File No. 5:91:CV:47

HON. RICHARD A. ENSLEN

MICHIGAN SUPERVISORS' UNION; OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION; WILLIAM T. GANNON, on behalf of himself and all other similarly situated supervisory security personnel employed by Defendant; and TRAVIS JONES, on behalf of himself and all other similarly situated civilian employees of Defendant,

Plaintiffs,

v

STATE OF MICHIGAN; DEPARTMENT OF CORRECTIONS; and DEPARTMENT OF CIVIL SERVICE,

Defendants.

ORDER

In accordance with the Opinion entered this date;

IT IS HEREBY ORDERED that defendants' to alter or amend judgment under Rule 59(e), filed March 18, 1993 (dkt. #92-1 & 92-2), is **DENIED.**

DATED in Kalamazoo, MI:
July 22, 1993

s/ Richard A. Enslen
RICHARD A. ENSLEN
U.S. District Judge

APPENDIX H — UNITED STATES DISTRICT COURT ORDER FILED AUGUST 24, 1993

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

File No. 5:91:CV:47

MICHIGAN SUPERVISORS' OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION; WILLIAM T. GANNON, on behalf of himself and all other similarly situated supervisory security personnel employed by Defendant; and TRAVIS U. JONES, on behalf of himself and all other similarly situated civilian employees of Defendant,

Plaintiffs,

v

MICHIGAN DEPARTMENT OF CORRECTIONS; and MICHIGAN DEPARTMENT OF CIVIL SERVICE,

Defendants.

ORDER

This matter comes before the Court on defendants' letter, dated August 5, 1993, in which defendants informed the Court that the parties could not agree on various issues that arose during their efforts to submit a stipulation regarding total damages, as requested by this Court.

Defendants, in their letter, also indicate that plaintiffs, contrary to this Court's opinion filed on July 23, 1993, concerning defendants' motion to strike class plaintiffs, have

filed additional consents to join the action after July 23, 1993, when this Court issued opinions on the issue of damages and the motion to alter or amend.

Accordingly:

IT IS HEREBY ORDERED that within fourteen (14) days of this order, the parties submit a joint proposed order to this Court detailing the issues that remain contested in this matter, so that a final judgment can be entered;

IT IS FURTHER ORDERED that the above-referenced proposed order include a briefing schedule concerning the issues identified by the parties;

IT IS FURTHER ORDERED that no plaintiffs will be allowed to join the class after July 23, 1993, the date this Court filed its opinions on the issue of damages and the motion to alter or amend.

DATED in Kalamazoo, MI:
Aug. 23, 1993

s/ Richard A. Enslen
Richard A. Enslen
U.S. District Judge

APPENDIX I — UNITED STATES DISTRICT COURT OPINION AND ORDER FILED DECEMBER 20, 1993

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

File No. 5:91:CV:47

HON. RICHARD A. ENSLEN

MICHIGAN SUPERVISORS' UNION; OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION; WILLIAM T. GANNON, on behalf of himself and all other similarly situated supervisory security personnel employed by Defendant; and TRAVIS JONES, on behalf of himself and all other similarly situated civilian employees of Defendant,

Plaintiffs,

v

STATE OF MICHIGAN; DEPARTMENT OF CORRECTIONS; and DEPARTMENT OF CIVIL SERVICE,

Defendants.

OPINION

This matter is before the Court on the parties' briefs concerning the two remaining damages issues identified in the parties' joint status report that was filed September 8, 1993. The parties filed briefs on these issues in November 1993.

This case involves various claims made under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219. The damages issues concern unpaid furlough days mandated by the State of

Michigan in August 1991. This Court previously found that for those plaintiff employees who would be considered "salaried" under FLSA, the unpaid furlough days were a violation of FLSA, as alleged in Count V, and, therefore, defendants were liable for reimbursement of the salary unlawfully withheld. Also, this Court determined that prejudgment interest is due, and that it should be calculated from the time this money should have originally been paid.

The first issue that remains for this Court to resolve is whether the members of the plaintiffs class who are entitled to reimbursement for the furlough days include those plaintiffs who held the rank of sergeant or lieutenant at the time of the furlough. The second issue is to establish an appropriate prejudgment interest rate to be used.

DISCUSSION

Members Entitled to Reimbursement for Furlough Days

Plaintiffs have pounced upon some language in this Court's Order issued March 4, 1993 to assert that this Court found that all plaintiffs are entitled to the furlough day reimbursement. Plaintiffs' interpretation of that Opinion and Order is incorrect. In that Order, this Court ruled that "judgment is **GRANTED** in favor of all plaintiffs and against all defendants as to count V of plaintiffs' second amended complaint."

A review of the issue being resolved by that order reveals that the Court was not faced with the question of whether sergeants and lieutenants were "salaried employees" under FLSA. Rather, the issue was whether or not, as a matter of law, salaried employees who worked during part of a week were

entitled to their full salary for that week even though the state mandated that some furlough days be taken during that week. This Court found that the salaried employees were entitled to be paid their full salary.

As to the issue of whether sergeants and lieutenants are "salaried employees" under FLSA, defendants' contention that the parties have treated these employees as unsalaried since the March 4th Order is persuasive. Plaintiffs' initial brief concerning damages, filed March 18, 1993, included as Exhibit 1 an unsigned stipulation concerning damages stating that the parties agreed that those plaintiffs "holding the rank of sergeant or lieutenant at the time of the Furlough are not 'salaried' employees as that term is defined" in FLSA. Nothing in plaintiffs' brief filed in March indicates any contrary view from plaintiffs.

At about the same time, on March 16, 1993, plaintiffs' attorney signed a different stipulation regarding damages which provided that defendant would produce information on the lost wages caused by the furlough days to each plaintiff "except those Plaintiffs who are eligible for overtime under the Michigan Civil Services Compensation Plan ... with respect to Count V of Plaintiffs' Second Amended Complaint." The plaintiffs ranked below captain were ruled eligible for this overtime.

Being paid an hourly rate for overtime does not defeat an exemption from FLSA coverage, and treatment as a salaried employee. *Hartman v. Arlington County, Virginia,* 720 F. Supp. 1227, 1229 (E.D. Va. 1989). However, such overtime is an indicator of hourly status. *Dole v. Malcolm Pirnie, Inc.,* 758 F. Supp. 899 (S.D. N.Y. 1991), *rev'd on other grounds, Martin v. Malcolm Pirnie, Inc.,* 949 F.2d 611 (2nd Cir. 1991). In *Dole,* unlike the present case, there were employee bonuses given for

putting in extra time, thus negating the probative value of the receipt of overtime. *Id.*

Count V, which sought relief due to the furlough days, was added in the event the Court found that plaintiffs were paid on a "salary basis" under FLSA, rather than as hourly employees entitled to FLSA's overtime protections. The second amended complaint that added Count V followed on the heals of a Michigan Civil Service Commission Employment Relations Board ruling in favor of all non-salaried members of plaintiff classes below the rank of captain, awarding them premium overtime compensation for the pre-shift lineups.

This Court, in its Opinion in March, considered those employees similarly situated to named plaintiffs, Travis Jones and William Gannon, who were treated by the State as exempt from the FLSA overtime provisions due to being paid on a salary basis, and found that because their compensation had never in fact been reduced for a partial day's absence, they were "salaried." As a result, though these employees were ineligible for the overtime payments, they were, as a result, eligible for reimbursement of the reduction in salary caused by the furlough days. Plaintiff Jones was a deputy warden of a state prison, and plaintiff Gannon was ranked as a captain at the correctional facility.

This Court did not, as contended by plaintiffs, determine that plaintiffs ranked below captain, who were ruled eligible for overtime, were similarly situated to the named plaintiffs and entitled also to reimbursement of lost pay due to the furlough days. There has been no finding that the lower ranked plaintiffs, unlike those similarly situated to plaintiffs Jones and Gannon, were not subject to actually having their pay reduced for a partial day's absence.

Finally, plaintiffs have maintained from the outset that none of their members, including sergeants and lieutenants were "salaried" as defined in FLSA.[1]

I find that defendants arguments concerning the non-salaried plaintiffs to be persuasive. The non-salaried plaintiffs, who are identified in Exhibit 4 attached to defendants' brief, should not be reimbursed for the furlough days.

Interest Rate for Prejudgment Interest

"[I]n the absence of a statutory provision to the contrary the award of prejudgment interest is a matter addressed to the discretion of the court." *E.E.O.C. v. Wooster Brush Co. Employees Relief Ass'n*, 727 F.2d 566, 579 (6th Cir. 1984).

Plaintiffs request that the prejudgment interest rate be set at 12% compounded annually, citing *Colunga v. Young*, 722 F. Supp. 1479, 1488 (W.D. Mich. 1989), *aff'd*, 914 F.2d 255 (1990). However, at that time the Court found that the 12% rate to "at least roughly reflect [defendant's] cost of borrowing . . . ." *Id.*

In *Wooster Brush*, the Sixth Circuit predicted that in the future the "district courts may be influenced by the congressional wisdom expressed in the amendment of 28 U.S.C. § 1961(a) . . . . " 727 F.2d at 579. However, the court also noted that district courts were not "invariably compelled to adopt the statutory postjudgment rate in determining prejudgment interest." *Id.*

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1. In fairness, it should be noted that plaintiffs maintain that members ranked above lieutenant should also not be considered "salaried," even though this Court has ruled otherwise and has provided that damages resulting from the unpaid furlough days are due these plaintiffs.

Appendix I

The Ninth Circuit has stated that section 1961's postjudgment rate (T-Bill rate) should also be the rate for prejudgment interest "unless the trial judge finds, on substantial evidence, that the equities of the particular case require a different rate." *Ford v. Alfaro*, 785 F.2d 835, 842 (9th Cir. 1986). This rate is "equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills . . . ." 28 U.S.C. § 1961(a).

Defendants have suggested using either the T-Bill rate described above or an adjusted prime rate. Senator Grassley, the sponsor of the amended section 1961, commented that the 52-week T-bill rate "more accurately reflect[s] prevailing money market conditions" than the prime rate. *Holley v. Korean Air Lines Co.*, 834 F. Supp. 65 (S.D. N.Y. 1993) (citing 127 Cong. Rec. 29865 (daily ed. Dec. 8, 1981) (statement of Sen. Grassley)).

I believe that the 12% interest rate requested by plaintiffs does not accurately reflect the appropriate cost of borrowing that existed since 1991 when the furlough days were imposed. I see no reason why the treasury bill rate provided in section 1961 would not sufficiently reflect an appropriate rate for prejudgment interest. Consequently, the Court finds that the prejudgment rate should be the rate provided for in section 1961. This interest should be calculated from the date the affected plaintiffs would have received their pay for the furlough days. Apparently, some plaintiffs may have taken furlough days in more than one pay period. If so, the interest will need to be calculated separately.

Defendants attached a table in Exhibit 4 to their brief filed November 8, 1993. This table purports to indicate the amounts of unpaid salary that resulted from the furlough days for each of the

salaried plaintiffs. Defendants calculated the total reimbursement that was due to be $68,933.92, not including the prejudgment interest. Plaintiffs have not disagreed that this is the amount due the employees identified by defendants. Plaintiffs have not disagreed that defendants have accurately identified all of the plaintiffs whom defendants claim, and whom this Court now agrees, were appropriately included within the class of plaintiffs entitled to reimbursement for the furlough days.

The Department of the Treasury has indicated that the section 1961 interest rate applicable to August 1991 is 5.68%.[2]

CONCLUSION

For the foregoing reasons, the Court agrees with defendants' positions on both of the remaining issues in the case. Only those members of the plaintiffs class who were "salaried" and who actually were forced to take the furlough days in August 1991 are eligible for reimbursement of the pay unlawfully withheld. This class does not include plaintiffs who were ranked below captain and who were eligible for overtime in relation to the pre-shift lineups.

The prejudgment interest rate to be used is the treasury bill rate provided in 28 U.S.C. § 1961 and is to be calculated from the date the plaintiffs would have received their pay for the furlough

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2. The interest rate for the auction date of July 25, 1991 was 6.26%; for August 22, 1991 it was 5.68%; and for September 19, 1991 it was 5.57%. The table from defendants indicates that furlough days occurred during pay periods ending on August 17, 1991 and August 31, 1991. In determining the applicable interest rate to be 5.68%, the Court is assuming that the salaries for both of these pay periods would have been paid between the dates of August 22, 1991 and September 19, 1991. The parties should inform the Court if this assumption is in error.

days. This rate appears to be 5.68%, according to the United States Department of the Treasury.

DATED in Kalamazoo, MI:
Dec. 20, 1993

s/ Richard A. Enslen
Richard A. Enslen
United States District Judge

Appendix I

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

File No. 5:91:CV:47

HON. RICHARD A. ENSLEN

MICHIGAN SUPERVISORS' UNION; OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION; WILLIAM T. GANNON, on behalf of himself and all other similarly situated supervisory security personnel employed by Defendant; and TRAVIS JONES, on behalf of himself and all other similarly situated civilian employees of Defendant,

Plaintiffs,

v

STATE OF MICHIGAN; DEPARTMENT OF CORRECTIONS; and DEPARTMENT OF CIVIL SERVICE,

Defendants.

ORDER

In accordance with the Opinion entered this date;

IT IS HEREBY ORDERED that defendants' request that the members of the class to whom reimbursement of the unpaid salary that resulted from the furlough days imposed by defendants be limited to those members of plaintiffs' class who were paid on a salary basis, were not ranked below captain, and were forced to take unpaid furlough days, as identified in Exhibit

4 to defendants brief on remaining damages issues, filed November 8, 1993 (dkt. #133) is **GRANTED**;

IT IS FURTHER ORDERED that plaintiffs' request that all plaintiffs, including those ranked below captain, who were forced to take unpaid furlough days be included among those plaintiffs to whom reimbursement is due, filed November 8, 1993 (dkt. #132) is **DENIED**;

IT IS FURTHER ORDERED that defendants' request that the applicable prejudgment interest rate be set at the rate provided for postjudgment interest in 28 U.S.C. § 1961 that was applicable on the date the unpaid salary from the furlough days was to have been paid, filed November 8, 1993 (dkt. #133) is **GRANTED**;

IT IS FURTHER ORDERED that plaintiffs' request that the prejudgment interest rate be set at 12%, filed November 8, 1993 (dkt. #132) is **DENIED**;

IT IS FURTHER ORDERED that because the issues considered in the accompanying Opinion were decided without reference to defendants' reply brief to plaintiffs' reply brief, plaintiffs' letter request, filed December 16, 1993 (dkt. #136), is **DENIED as moot**;

IT IS FURTHER ORDERED that the parties shall file a stipulation concerning the total damages to be paid, including prejudgment interest, **on or before January 7, 1994 at 5:00 p.m.** No facsimile will be accepted.

DATED in Kalamazoo, MI:
Dec. 20, 1993

s/ Richard A. Enslen
Richard A. Enslen
United States District Judge